Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-249

LESTER GENSER and LAWRENCE FORMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

LESTER GENSER and
LAWRENCE FORMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Lester Genser and Lawrence Forman petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on July 16, 1979.

OPINIONS BELOW.

The judgments of the United States District Court for the District of New Jersey (A1-A5) have not been officially reported. The first opinion of the United States Court of Appeals for the Third Circuit (A7-A44) is reported at 582 F. 2d 292. The findings of fact and conclusions of law of the District Court on remand (A45-A57) have not been officially reported. The second opinion of the Court of Appeals (A58-A73) is reported at 595 F. 2d 146. The findings of fact and conclusions of law of the District Court on the second remand (A74-A79) have not been officially reported, nor has the third opinion of the Court of Appeals (A80-A86).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Under this Court's decision in **United States v. LaSalle National Bank,** 437 U. S. 298 (1978), must a taxpayer who has proved that the Internal Revenue Service had formed an institutional commitment to prosecute him before it issued civil summonses for records to be used in his case also prove that the summonses had no civil purpose whatever in order to suppress at his criminal trial the evidence produced in response to the summonses?

STATUTE INVOLVED.

26 U. S. C. § 7602.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT.

This petition raises the question whether this Court's decision in **United States v. LaSalle National Bank,** 437 U. S. 298 (1978), permits the Internal Revenue Service to continue to use civil summonses to collect information about a taxpayer after the Service has made an institutional commitment to prosecute that taxpayer.

On September 30, 1976, petitioners Lester Genser and Lawrence Forman were convicted by a jury in the United States District Court for the District of New Jersey of violating and conspiring to violate the Internal Revenue Code. On November 11, 1976, Judge Herbert J. Stern sentenced each one to eight years in prison. Among other issues raised in their appeal, petitioners asked the United States Court of Appeals for the Third Circuit to rule that the lower court had erred in refusing to conduct an evidentiary hearing to determine whether certain administrative summonses issued pursuant to 26 U. S. C. § 7602 by the Internal Revenue Service during its investigation of petitioners were improperly issued in violation of petitioners' rights, and to determine whether to suppress all

evidence illegally obtained by the use of any improperly issued summons.[1]

The Court of Appeals issued its first opinion on February 23, 1978, remanding the consolidated cases to the district court with instructions "to conduct an evidentiary hearing . . . as to whether the government complied with 26 U. S. C. § 7602, . . . and if not, whether suppression is required." The court based its order of remand on its holding that petitioners had standing to move to suppress at trial evidence obtained by IRS summonses issued in violation of their right, deriving "from a federal statute, 26 U. S. C. § 7602, and from the gloss placed upon that statute by the federal courts, . . . not to be the target of an exclusively criminal investigation in which government agents have acted beyond their statutory authority."

As a result of a series of motions by the government, the time for filing a petition for rehearing was extended pending this Court's decision in **United States v. LaSalle National Bank,** 437 U. S. 298 (1978). After this Court handed down its decision in **LaSalle,** the Court of Appeals, on August 29, 1978, withdrew its initial opinion (A6) and substituted a new opinion (A7-A44) again remanding the cases for an evidentiary hearing in light of **LaSalle** to determine the validity of the IRS summonses. In remanding the cases, the Court of Appeals stated:

> "*LaSalle* . . . and the other cited decisions have promulgated a judicial policy, binding on the IRS, to protect a taxpayer from any attempt on the part of the IRS to obtain evidence by use of § 7602 summonses after the IRS recommends prosecution to the Department of Justice or after the IRS has abandoned, in an institutional sense, the pursuit of civil tax determination or collection." (**United States v. Genser,** 582 F. 2d 292, 309 (3d Cir. 1978) ("**Genser I**") (A39)).

1. The United States Court of Appeals for the Second Circuit has suggested that it may be appropriate to deny a motion to quash a civil summons for lack of evidence that the summons was issued in bad faith for the benefit of the Department of Justice and thereafter to permit a full suppression hearing if the summonsed evidence is to be used in a criminal trial. *See* **United States v. Chemical Bank,** 593 F. 2d 451, 458 (2d Cir. 1979).

On September 12, 1978, Judge Stern held a status conference during which he refused to allow petitioners any prehearing discovery and instead ordered the parties to subpoena any witnesses they desired to appear at the hearing. Petitioners served subpoenas on a number of former and present IRS and Department of Justice personnel, who they believed would have personal knowledge of the investigation. Petitioners also served subpoenas *duces tecum* upon the custodians of various records which related directly to the undisputed pre-referral involvement of a federal grand jury and the United States Attorney's office in these cases. Judge Stern quashed all of the subpoenas. The only IRS employee whom Judge Stern permitted petitioners to call was Special Agent Frank Parisi, who had conducted the investigation of petitioners. The only documents which Judge Stern required the government to produce were Special Agent Parisi's request for a "Reluctant Witness Grand Jury Authorization" and certain transmittal memoranda which detailed the various levels of review and approval necessary to obtain that extraordinary process. On the basis of even this limited evidence, Judge Stern stated during the hearing:

> "I tell you now, candidly, that I'm persuaded by you on the state of the record thus far that they [the IRS] had in mind ultimately that there would be a criminal prosecution. I could not make an honest fact finding

any differently." (Transcript of October 31, 1978, hearing at 166).

Nevertheless, on the restricted record before him, Judge Stern went on to find that the IRS investigation had had both a civil and a criminal aspect at all times when summonses were issued; on that ground he upheld the validity of all the summonses. Having limited petitioners to cross-examining a single witness, Special Agent Parisi, and having forbidden petitioners' counsel to inquire even of that agent into the content of his conversations with Assistant United States Attorney Kracov which preceded the issuance of the summonses, Judge Stern found that petitioners had failed to establish that Parisi was acting under the auspices of the United States Attorney when he issued the summonses. Judge Stern certified findings of fact and conclusions of law to this effect to the Third Circuit on November 2, 1978, as amended November 7, 1978 (A45-A57).

On March 9, 1979, the Court of Appeals again remanded the cases to Judge Stern because:

> "The district court failed . . . to confront defendants' claim that the IRS, as an institution, had committed itself before December 12, 1975 [the date of the formal IRS referral to the Department of Justice for prosecution], to refer the case for prosecution and that summonses issued after that commitment served no civil purpose." (**United States v. Genser,** 595 F. 2d 146, 151 (3d Cir. 1979) ("**Genser II**") (A68)).

The **Genser II** Court of Appeals offered also the following guidelines for discovery:

> "At a minimum, the taxpayer should be entitled to discover the identities of the investigating agents, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation, the date the Office of Regional Counsel referred the matter for prosecution, and the dates of all summonses issued under 26 U. S. C. § 7602. Furthermore, *the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.*
>
> *Where this information or other evidence introduced by the taxpayer reveals* (1) that the IRS issued summonses after the investigating agents recommended prosecution, (2) that inordinate and unexplained delays in the investigation transpired, or (3) *that the investigating agents were in contact with the Department of Justice, the district court must allow the taxpayer to investigate further.* In proper cases, this investigation could include the opportunity to examine the IRS agents or officials involved, or to discover documents." (595 F. 2d at 152 (A69-A70)) (Emphasis supplied).

The Court of Appeals, however, upheld Judge Stern's finding that petitioners had failed to establish that Special Agent Parisi issued the summonses at the behest of the United States Attorney.

Judge Stern conducted a second evidentiary hearing on April 27, 1979. Again he denied petitioners access to relevant IRS and Justice Department personnel, including Melvin Kracov, the Assistant United States Attorney who had admittedly worked with Special Agent Parisi in 1974 and 1975 in connection with the reluctant witness grand jury subpoenas, and to other testimonial and documentary evidence bearing on the institutional posture of the IRS

during the same period. Specifically, he denied petitioners, the opportunity "to discover the nature of any contacts . . . between the investigating agents and officials of the Department of Justice." (**Genser II,** 595 F. 2d at 152 (A69)). Even on this record, Judge Stern clearly found evidence of an institutional commitment to prosecute as early as late 1974, a date after which many summonses issued. At the end of the hearing government counsel requested that Judge Stern make a finding that "no summons was issued after the IRS formed an institutional commitment to recommend prosecution." (Transcript of April 27, 1979, hearing at 99-100). Judge Stern responded:

> "I will not, however, as a United States District Judge make the finding you ask me to make. I will not do that as a matter of conscience. It is wrong. If institutional bad faith is defined as that moment when a certain letter is passed, I might be able to do it. But until I am definitively told by a higher court that is what it means, I must undertake to do it as a human being. And I believe that from the first moment a representative of the Internal Revenue Service knows that a taxpayer has committed $10,000,000 worth [of tax evasion] they have a pretty good commitment to prosecute. And anybody who doesn't know that, it seems to me, is completely out of touch with reality." (Transcript of April 27, 1979, hearing at 100-01).

He then went on to find, based on Special Agent Parisi's testimony (the only testimony permitted at the second hearing), that each and every summons had issued for a civil purpose and that the IRS had engaged in no inordinate delay in transmitting to the Department of Justice its recommendation to prosecute. (Transcript of April 27, 1979, hearing at 98-99). Judge Stern then certified these last findings and conclusions to the Third Circuit for review, but refused to certify as a finding of fact or conclusion of law his response to government counsel's request for a finding regarding institutional commitment by the IRS.

On July 16, 1979, the Court of Appeals affirmed the judgment of the district court (**United States v. Genser,** — F. 2d — (3d Cir. 1979) ("**Genser III**") (A80-A86)). It rejected petitioners' contention that in the face of substantial evidence of an institutional commitment to prosecute, the District Court had improperly denied them an opportunity further to flesh out this evidence and to establish that the summonses had issued to gather information for the Department of Justice. The court grounded the affirmance on its holding that **LaSalle** requires a taxpayer to prove not only the existence of an institutional commitment to prosecute but also that a summons issued after the forming of the institutional commitment had no civil purpose, in order to render invalid a summons issued after that commitment. This shift on the part of the Court of Appeals from its reading of **LaSalle** in **Genser I** and in **Genser II** led the court to place upon petitioners the impossible burden of disproving any civil purpose to each summons issued after the IRS had formed an institutional commitment to prosecute. Petitioners come to this Court for relief from that burden, and for confirmation of this Court's holding in **LaSalle** that a summons issued after an institutional commitment to prosecute is *ipso facto* invalid.

REASONS FOR GRANTING THE PETITION.

The Third Circuit Has Rendered a Decision that Effectively Deprives Petitioners of the Significant Individual Rights Delineated in LaSalle.

In **LaSalle,** this Court, by its own characterization, supplemented its decision in **Donaldson v. United States,** 400 U. S. 517 (1971), in which it had held that IRS summonses are enforceable only if they are issued in good faith and before a recommendation for prosecution (400 U. S. at 536). The **LaSalle** majority addressed itself to both parts of the two part **Donaldson** test and, in doing so, established two barriers to the issuance of a valid civil summons. The first barrier can be identified simply by reading a postmark. After IRS has transmitted its formal recommendation for prosecution to the Department of Justice, no summons may validly issue since summonses issued after formal recommendation clearly broaden impermissibly the Justice Department's right of criminal discovery and infringe on the role of the grand jury.

After drawing the first hard line, the **LaSalle** majority moved on to define the good faith limits of the IRS' summons power. In this area, the majority did two things; it reaffirmed the good faith tests of **United States v. Powell,** 379 U. S. 48 (1964), and it set up a second barrier beyond which civil summonses may not validly issue. The Court said:

> "[T]he question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS. . . .
>
> ". . . We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights. Similarly, the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases." (437 U. S. at 316-17) (Footnote omitted).

Once an institutional commitment to prosecute is formulated, the Internal Revenue Service becomes likely to indulge in activities which this Court in **LaSalle** refused to countenance (437 U. S. at 317). These include delay in submitting the case to the Justice Department to permit the gathering, through civil summonses, of additional evidence for prosecution, and, more relevant to this case, the use of IRS civil summonses to gather information for other departments, including the Department of Justice. Accordingly, this Court's **LaSalle** opinion must have meant —and petitioners ask this Court to confirm this meaning— that once a taxpayer proves an institutional commitment to prosecute on the part of the IRS, no summonses may thereafter validly issue.

To require, as has the Court of Appeals, that a taxpayer not only prove an institutional commitment to prosecute, but also disprove any civil purpose whatsoever to every post-commitment summons is to render meaningless the **LaSalle** institutional commitment standard. Petitioners can conceive of no way in which they could disprove any civil or collection purpose to a summons calling for any kind of financial record either before or after the IRS had formed an institutional commitment to prosecute.

Yet this is the burden the Third Circuit has placed upon petitioners in **Genser III** by fixing upon, for the first time, the use of the conjunctive in the **LaSalle** majority's statement that:

> "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral *and* the Service would *merely* like to gather additional evidence for the prosecution." (437 U. S. at 316-17) (Emphasis added).

In context, this statement cannot possibly have the meaning the Third Circuit attributes to it, *i.e.*, that a taxpayer must disprove a civil purpose to summonses issued after IRS has formed an institutional commitment to prosecute, that both burdens must be borne. The **LaSalle** majority itself recognized the impossibility of the added burden placed upon petitioners when it noted that:

> "When an investigation examines the possibility of criminal misconduct, it also necessarily inquires about the appropriateness of assessing the 50% civil tax penalty." (437 U. S. at 309)(Footnote omitted).

Indeed, the Court of Appeals itself, in **Genser I** and **Genser II**, appeared to have recognized that the question posed by this Court in **LaSalle** was whether the Internal Revenue Service had become committed to a prosecution, so that it was collecting information for that purpose when it issued the civil summonses. Only in **Genser III** did the Court of Appeals place on petitioners the "impossible burden" (**Genser II**, 595 F. 2d at 150 (A66)) of proving that the IRS would not follow the prosecution with a civil proceeding to collect unpaid tax and penalties. Any and all criminal tax proceedings undoubtedly have a civil tax consequence, as do all summonses, subpoenas and search warrants used in furtherance thereof.

In this case, petitioners were never given a real opportunity to determine whether the summonses were issued after the IRS formed an institutional commitment to prosecute since they were denied access to any witness but Special Agent Parisi. Equally important, they never were given the opportunity to test Agent Parisi's denial that he had acted on behalf of the Department of Justice, since they were not permitted to see Agent Parisi's diaries of his meetings with Assistant United States Attorney Kracov or to question Parisi about them or to question Kracov at all.

Petitioners believe that a Third Circuit, weary from three appeals in this one case, misread **LaSalle** and in so doing deprived petitioners of significant individual rights. Petitioners therefore urge this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, and to make it clear that **LaSalle** denies to the IRS the power to issue civil summonses after it has formed an institutional commitment to prosecute.

CONCLUSION.

Wherefore, we respectfully request that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Of Counsel.

Dated: August 16, 1979.

Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

LAWRENCE FORMAN, Defendant

Docket No. Criminal 76-146

JUDGMENT AND PROBATION/COMMITMENT ORDER.

In the presence of the attorney for the government the defendant appeared in person on this date November 11, 1976 with counsel Herbert L. Zuckerman, Esq.

Plea: Not guilty

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of conspiracy on Count 1; False and fraudulent corporate income tax returns, on Cts. 2, 3, 4 and 5; False and fraudulent income tax returns on Counts 10, 11, 12 and 13. Untrue Corporate income tax returns on Counts 15, 16, 17 and 18. Untrue income tax returns on Counts 19, 20, 21 and 22.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2 years and a fine of $10,000.00 on Count 10. Deft. to stand committed until said fine is paid. 2 years, on Count 11 to run consecutively to term sentence imposed on Count 10, and a fine of $10,000.00. Deft. to stand committed until said fine is paid. 2 years on Count 12, to run consecutively to term sentence imposed on Counts 10 and 11 and a fine of $10,000.00 deft. to stand committed until said fine is paid. 2 years on Count 13, to run consecutively to term sentence imposed on Counts 10, 11 and 12 and a fine of $10,000.00, deft. to stand committed until said fine is paid. 5 years on each of Counts 1 thru 5, to run concurrently with each other and concurrently with term sentences imposed on Counts 10, 11, 12 and 13, and a fine of $10,000.00 on each of Counts 1 thru 5, deft. to stand committed until said fines are paid. 3 years on each of Counts 15 thru 18, to run concurrently with each other and concurrently with term sentence imposed on Counts 10, 11, 12 and 13, and a fine of $5,000.00 on each of Counts 15 thru 18, deft. to stand committed until said fines are paid. 3 years on each of Counts 19 thru 22, to run concurrently with each other and concurrently with term sentence imposed on Counts 10, 11, 12 and 13, and a fine of $5,000.00 on each of Counts 19 thru 22, deft. to stand committed until said fines are paid.

Total prison term of 8 years and a total fine of $130,000.00.

IT IS FURTHERED ORDERED that sentence be and is hereby stayed pending appeal.

/s/ H. J. STERN
U. S. District Judge

Date 11/22/76

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

LESTER GENSER, Defendant

Docket No. Criminal 76-146

JUDGMENT AND PROBATION/COMMITMENT ORDER.

In the presence of the attorney for the government the defendant appeared in person on this date November 11, 1976 with counsel Maurice M. Krivit, Esq.

Plea: Not guilty

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of conspiracy on Count 1, false and fraudulent corporate income tax returns on Counts 2, 3, 4 and 5; False and fraudulent income tax returns on Counts 6, 7, 8 and 9; Untrue corporate income tax returns on Counts 15, 16, 17 and 18; Untrue income tax returns on Counts 24, 25, 26, 27 and 28.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2 years and a fine of $10,000.00 on Ct. 6; 2 years on Count 7, to run consecutively to term sentence imposed on Ct. 6, and a fine of $10,000.00; 2 years on Ct. 8, to run consecutively to term sentence imposed on Cts. 6 and 7, and a fine of $10,000.00; 2 years on Ct. 9, to run consecutively to term sentence imposed on Cts. 6, 7 and 8, and a fine of $10,000.00. Defendant to stand committed until said fines on Cts. 6, 7, 8 and 9 are paid; 5 years on each of Counts 1 thru 5, to run concurrently with each other and concurrently with term sentences imposed on Cts. 6, 7, 8 and 9, and a fine of $10,000.00 on each of Cts. 1 thru 5, deft. to stand committed until said fines are paid. 3 years on each of Counts 15 thru 18, to run concurrently with each other and concurrently with term sentence imposed on Cts. 6, 7, 8 and 9, and a fine of $5,000.00 on each of Cts. 15 thru 18, deft. to stand committed until said fines are paid. 3 years on each of Cts. 24 thru 28, to run concurrently with each other and concurrently with term sentence imposed on Cts. 6, 7, 8 and 9, and a fine of $5,000.00 on each of counts 24 thru 28, deft. to stand committed until said fines are paid.

All above sentences imposed pursuant to 18 U. S. C. 4205(b)(2).

Total prison term of 8 years and a total fine of $135,000.00.

IT IS FURTHERED ORDERED that sentence be and is hereby stayed pending appeal.

/s/ H. J. STERN
U. S. District Judge

Date 11/22/76

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2623 and 76-2624

UNITED STATES OF AMERICA,
Appellee

v.

LESTER GENSER
and
LAWRENCE FORMAN,
Appellants

(D. C. Crim. Nos. 76-146-1 and 76-146-2)

ORDER

AND NOW, this 29th day of August, 1978,

IT IS ORDERED, that the slip opinion filed herein on February 23, 1978, be and the same hereby is withdrawn, and there is substituted in lieu thereof the opinion attached to this Order.

By THE COURT:

BIGGS
Circuit Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2623 and 76-2624

UNITED STATES OF AMERICA,
Appellee

v.

LESTER GENSER
and
LAWRENCE FORMAN,
Appellants

(D. C. Crim. Nos. 76-146-1 and 76-146-2)

APPEAL FROM THE ORDERS OF JUDGMENT AND COMMITMENT DATED NOVEMBER 11, 1976 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 4, 1977

Before SEITZ, *Chief Judge*, and BIGGS and HUNTER, *Circuit Judges*

(Opinion filed August 29, 1978)

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OPINION OF THE COURT

BIGGS, *Circuit Judge.*

The appellants, defendants below, Genser and Forman, appeal from their convictions by a jury for violations of 18 U. S. C. §§ 2, 371, and 26 U. S. C. §§ 7201, 7206(1). The indictment charged both appellants with conspiracy to evade personal and corporate income taxes, and with the substantive crimes of evading corporate and personal income taxes, and subscribing to corporate tax returns which understated their adjusted gross income. The appeals were consolidated pursuant to the rules of this court and are properly before us pursuant to 28 U. S. C. § 1291.

The appellants assert (1) that there is insufficient evidence to support their convictions on the personal income tax charges; (2) that the trial court erred in permitting an agent of the Internal Revenue Service to testify as to the results of an audit of their corporation's books, which audit the agent did not conduct or supervise and which was not introduced into evidence; and (3) that the United States procured some of its evidence illegally by administrative summonses pursuant to 26 U. S. C. § 7602, and that the district court erred in not granting an evidentiary hearing. They contend that such a hearing would have demonstrated that the administrative summonses were issued after the United States had formed an intention to prosecute the appellants for income tax evasion and fraud, and that therefore the evidence procured by the summonses was tainted and should have been suppressed, and a new trial granted.

I.

Lawrence Forman and Lester Genser were, respectively, the president and vice president of Genser-Forman, Inc. (Corporation) from 1957 until early 1973. The Corporation was the sole distributor in the northeastern United States of Triumph cars and parts for British Leyland Motors, Inc. (British Leyland) until the Corporation was dissolved in 1973. The Corporation bought cars and parts from British Leyland and resold them to a network of automobile dealers located in its exclusive area of distribution. From 1969 to 1973, the years encompassed by the indictment, the Corporation purchased and imported approximately 6000 cars per year from British Leyland.

By contractual agreement between the Corporation and British Leyland, British Leyland bore all of the expenses of repair to "marine damage" to the cars occurring during their transportation from England to the United States. Although initially British Leyland reimbursed the Corporation for its actual repair expenses in accordance with an appraiser's estimate, after 1966 it followed a policy of paying the Corporation a fixed marine damage reimbursement of $36.00 for every Triumph delivered to the Corporation. In addition, British Leyland reimbursed the Corporation for repairs done by the Corporation under warranty, for obsolete parts returned to British Leyland by the Corporation, for discontinued models of automobiles remaining in inventory, for one-third of the Corpo-

ration's advertising costs, and for part of the rental expenses of a New York City showroom. Dealers to whom the Corporation distributed Triumph cars reimbursed the Corporation for its transportation expenses.

The charges brought against appellants stem from their handling of these funds. From 1967 until early 1973, the moneys received from British Leyland and the Triumph dealers were deposited, pursuant to the directions of Genser and Forman, in a corporate account maintained in the name of Genser-Forman, Inc., in the City National Bank of Hackensack (Hackensack Account). These funds were kept separately from other funds of the Corporation, which were kept in the First National State Bank, Millburn-Short Hills Branch. Genser and Forman were the only signatories on the Hackensack Account.

From 1969 to 1973, the period encompassed by the indictment, nearly $2,200,000, representing sums paid to the Corporation from British Leyland and the dealers, was diverted to the Hackensack Account. None of the Corporation's books and records, and none of its tax returns, reflected any of these funds. Nor were the Corporation's accountants aware that the Corporation had such funds, either as income or as offsets to deducted expenses; the accountants did not perform audits of the Corporation's expense accounts and ledgers, but merely assembled books and records prepared by the Corporation from which the Corporation's tax returns were prepared. Had the accountants been aware of the funds and the sources thereof, the funds would have either increased the Corporation's cash account or decreased an expense account, with the result that the Corporation's profits would have been greater and its federal income tax liability larger. The government calculated that for the years 1970 to 1973, inclusive, the Corporation had an additional

tax liability of $884,487.02 and additional gross profits of $1,830,267.76.[1]

The funds deposited in the Hackensack Account were used by the appellants to purchase a variety of tax-exempt municipal bearer bonds through third party nominees. From 1969 to 1973, a total of $2,084,975.34—representing more than 100 bond transactions—was withdrawn from the Hackensack Account to effectuate the purchase of the bonds, which were kept in corporate safe deposit boxes in the Millburn-Short Hills branch of the First National State Bank. The books, records, and tax returns of the Corporation never reflected the acquisition of the bonds, and the Corporation's accountants were never informed that the bonds were purchased. On the theory that the appellants had appropriated the corporate moneys in the Hackensack Account to their own use by purchasing bonds for their own benefit, and that these moneys thus represented unreported income to the appellants, the government calculated that from 1969 to 1972, inclusive, Genser had additional personal taxable income of $1,108,438.81 and additional tax liability of $777,777.64, while Forman had

1. Although appellants do not contest the sufficiency of the evidence relating to their convictions on the *corporate* tax evasion counts, they do suggest, but only in their statement of facts, that the government offered no proof that the Corporation had deducted on its books and records expenses for which it later received reimbursement. In fact, the only deductions taken by the Corporation for repair of marine damage during the relevant period was the salary of two body shop employees, totaling $22,500 per year. The government, however, argues that it was trying not a net worth method of proof case, but rather a specific items method of proof case, under which it is sufficient to show that contrary to usual practices a defendant received certain payments in cash which were not in turn reported on income tax returns. *See, e.g., United States v. Bray,* 76-2 U. S. T. C. ¶ 9804 (10th Cir. 1976); *United States v. Stein,* 437 F. 2d 775 (7th Cir.), *cert. denied,* 403 U. S. 905 (1971).

additional personal taxable income of $914,107.36 and additional tax liability of $645,355.69.[2]

In early 1973, British Leyland abandoned its distributorship arrangement and bought out the Corporation. Following the acquisition, the Corporation, pursuant to § 337 of the Internal Revenue Code, liquidated and distributed all of its assets. As a result of the liquidation, all assets of the Corporation became the sole and exclusive property of Genser and Forman and came under their personal dominion and control between October 1972 and October 1973.

II.

Appellants argue that the evidence was insufficient to support their convictions on personal income tax evasion in that the government failed to prove beyond a reasonable doubt that they exercised personal dominion and control over the funds in the Hackensack Account and the proceeds thereof (the bonds) prior to the liquidation of the Corporation. Specifically, they contend that the bulk of the government's proofs establish only that appellants exercised personal dominion and control over the bonds *after* the Corporation was liquidated (at which point, they stress, the Corporation's assets were rightfully theirs),[3]

2. The government introduced Exhibit G-59, which attributed in summary fashion the various bonds purchased with funds from the Hackensack Account to either Genser or Forman, or to both. The exhibit was based upon bank statements reflecting withdrawals from the Hackensack Account, bond purchase documentations obtained from the various brokerage houses, coupon collection letters of the First National State Bank in Millburn which recorded bond coupon negotiations by the appellants (Exhibit G-26), and the testimony of witnesses who had received bonds or coupons from the appellants.

3. The government, however, contends that the liquidation itself was improper because none of the bonds were reflected on the closing tax returns in 1973.

and that the government on the whole failed to show by documentary evidence any exercise of personal dominion and control prior to the Corporation's liquidation.

Viewing the evidence, as we must, in the light most favorable to the government, *Glasser v. United States*, 315 U. S. 60, 80 (1942), we think that the evidence is sufficient to secure appellants' convictions. Rather than detail all the evidence presented on this issue, we think it sufficient to cite the following in support of our conclusion:

(1) More than 100 bond purchase transactions were paid for with funds from the Hackensack Account. Virtually all these purchases were tied back to the Hackensack bank statements by the amount appearing on the bond purchase documentations, which also indicated the types of bonds acquired and the serial numbers. The government also introduced coupon collection letters (Exhibit G-26), which recorded bond coupon negotiations by the appellants prior to liquidation of the Corporation. More than one-half of the transactions were further linked to appellants by interest coupons cashed or otherwise used by them or their relatives bearing the same serial numbers as the bonds purchased with the Hackensack moneys. Although, as appellants stress, the coupons actually introduced at trial by the government were dated and cashed at various times *after* liquidation, testimony established that within one year after coupons have been negotiated, they are destroyed by the paying agent, bank, or issuing authority. We think that, considering the other evidence of appellants' pre-liquidation dominion and control, reviewed *infra*, the trial court did not abuse its discretion in admitting coupons cashed after 1973, the only coupons which the government could physically produce.

To take but one example, the evidence shows that on March 26, 1971, four bonds, The Board of Education of the Township of Union, New Jersey, serial numbers 723

through 726, were purchased from Hanauer, Stern & Co. for $15,793.44. The Hackensack bank statement recorded a withdrawal on March 30, 1971, of $15,793.44. Each of the four bonds bore numerous coupons, each worth $102.50, payable every six months. According to the coupon collection letters, every six months, from 1971 onward, $410.00 ($4 \times \$102.50$) was charged to appellants' personal account. Although the collection letters contain the name of the depositor, the issuing authority, and the value of the coupons, they do not list the serial numbers of the coupons or bonds being negotiated. Because, as stated, coupons are destroyed within one year after negotiation, the only coupons physically produced by the government in connection with these particular bonds were dated February 1976, long after liquidation. Appellants thus argue that due to the lack of serial numbers on the coupon collection letters, and due to the lack of coupons cashed prior to liquidation, the government failed to prove that coupons negotiated by them prior to liquidation came from the specific bonds purchased with Hackensack funds in 1971. However, we think that in light of all the evidence introduced, this was a matter for the jury.

(2) The Corporation's tax returns from 1969 to 1973 failed to reflect the existence of the Hackensack Account or the bonds purchased therewith either in the asset column of the balance sheet under "Government obligations" or in Schedule M-1, 7, "Tax-exempt interest."

(3) The manner in which the bonds were purchased suggests that appellants did not regard them as Corporate property even at the time of their purchase. Appellants' orders for bonds were placed by third parties for customer's accounts which did not indicate the customer's name. With respect to certain bonds purchased for Genser through an officer of the City National Bank in Hackensack,

normal banking procedures regarding purchase and delivery of the bonds apparently were not followed; although the bank maintained a bound volume in which all bond purchases were listed along with the purchaser's signatures, information relative to Genser's purchases were kept in a separate file maintained only for him. Moreover, several purchases were apparently designed to be divided equally between Genser and Forman; on numerous occasions, where two purchases of bonds from the same issuer had slightly different purchase prices, a check for the exact difference made payable to cash and signed by Genser or Forman would be issued on the Hackensack Account in order to equalize appellants' holdings. One purchase executed for Genser in 1967 included a change of order slip directing the investment company to split the purchase equally in two; thereafter, both appellants negotiated coupons from this bond.

(4) Appellants concede that in *1970 or 1971*, Richard Genser, appellant Genser's son, received several $5000 New Jersey Turnpike Authority bonds as a gift from his father. The bonds, which bore serial numbers 11499-11507, were admitted into evidence. Other evidence established that these bonds were purchased with funds from the Hackensack Account in 1970. On July 15, 1975, Richard Genser cashed six $130 coupons, number 14 in the coupon series, from these same bonds. Furthermore, Richard Genser testified that in *1972 or 1973* he borrowed New Jersey Turnpike Authority bonds, in the face amount of $30,000 or $35,000, from his father as collateral for a loan at First National State Bank. He indicated that he believed the bonds to be the same type as those he had received as a gift from his father in 1970 or 1971.

(5) John Genser, another of appellant Genser's sons, testified that between *1968 and 1970*, he received coupons,

totaling $4035 annually, from New York Port Authority bonds held by his father, and that he, John, cashed the coupons and received the proceeds. In 1973 or 1974 he received from his father the same bonds (with a face value of $120,000) from which those coupons had been clipped. The record shows that New York Port Authority bonds were among those purchased with money from the Hackensack Account. John Genser testified that he accompanied his father to the First National Bank in Millburn on one occasion, and that his father may have gotten the bonds there and later given them to him at home.

(6) Samuel Albanese, a bank officer at the First National State Bank, Millburn-Short Hills branch, testified that (at an unspecified time) proceeds of coupons were deposited by Genser in his personal account at that bank. Bank records demonstrate that *prior* to 1973 at least some of the deposits took place shortly after Genser had access to the safety deposit boxes which were maintained by the Corporation at the bank and which appellants concede were used to store the bonds. The government produced numerous coupons from bonds purchased with money from the Hackensack Account, which were negotiated by Genser at the First National Bank during 1975 and 1976.

III.

The appellants argue that it was error for the trial judge to allow Special Agent Dorgeval to testify as an expert witness about his opinions concerning the results of an IRS audit of the appellants' records, since Dorgeval did not participate in or supervise the audit and the audit itself was not introduced into evidence. Dorgeval testified, *inter alia*, that based upon his own examination of the Corporation's books and records, the money placed by the appellants into the Hackensack account constituted unreported

income. While the record is unclear as to whether Dorgeval relied upon an audit conducted solely by other agents, which audit was not admitted into evidence, assuming *arguendo* that he had done so, his testimony would not have been rendered inadmissible.

Federal Rule of Evidence 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.* The testimony adduced from Dorgeval, even if partially based upon hearsay, was in compliance with the rule. The principal question is whether any out-of-court statements and reports relied upon by the expert are such that he can reasonably rely upon them and whether his reliance is reasonable under the facts of the case. 3 *Weinstein's Evidence*, ¶ 703[03]; *United States v. Sims*, 514 F. 2d 147, 149 (9th Cir. 1975). We fail to discern any abuse of discretion by the trial judge in allowing Dorgeval to rely in part—if he did—upon the government audit in reaching his conclusions, especially since the appellants attack the reliability of the audit papers primarily on the ground that IRS agents acted improperly in issuing administrative summonses.[4]

The appellants urge that because the audit papers were not admitted into evidence and because the government did not use the testimony of the agents who did prepare the audit, they were denied the right to cross-examine the auditing agents' conclusions and underlying

4. It is unclear whether appellants are suggesting that, in general, IRS conduct in this case is not to be trusted, or that the allegedly illegal summonses were used to obtain documents upon which the audit was based.

documentation. However, the confrontation clause does not by itself prohibit the use of hearsay testimony. *See California v. Green*, 399 U. S. 149 (1970). Rather, it focuses upon the right of the accused to "'confront and probe each of his accusers.'" *United States v. Williams*, 447 F. 2d 1285, 1289 (5th Cir. 1971) (footnote and citation omitted). Here, at the most, Dorgeval was testifying to his own opinion, based upon the audit, and the appellants had a full opportunity to confront his opinions and reduce their impact in any manner available, including questioning his reliance upon the audits without having been involved in the auditing process himself. *See Williams, supra*, at 1288-90.

We conclude that no error was committed by the trial judge in admitting Dorgeval's testimony.

IV.

Appellants contend that portions of the evidence upon which their convictions were based were obtained by means of illegally issued Internal Revenue Service (IRS) administrative summonses and thus should have been excluded by the trial court along with the tainted fruits thereof. They also assign as error the trial court's refusal to hold an evidentiary hearing to determine whether the administrative summonses, served on third parties pursuant to 26 U. S. C. § 7602, were issued in good faith and prior to a recommendation of criminal prosecution.[5]

5. Although no evidentiary hearing was ever held, appellants contended in the district court, and allege on appeal, that in 1971 the IRS began an audit of the books and records of the corporation for the taxable years 1969 and 1970. The audit resulted in a finding of no deficiency for both years. On November 14, 1974, the IRS began a second investigation, pursuant to 26 U. S. C. § 7605(b), into taxable years 1969 and 1970 as well as into taxable years 1971-1974. Throughout the second investigation, in 1974 and 1975, Special Agents of the IRS served administrative summonses, issued under the authority of 26 U. S. C. § 7602, to the following persons

Section 7602, 26 U. S. C. § 7602, permits the IRS to issue summonses to persons to obtain testimony and documents for the limited purposes of "ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability."[6] In *Donaldson v. United States*, 400 U. S. 517 (1971), the Supreme Court, interpreting its earlier decision in *Reisman v. Caplin*, 375 U. S. 440, 446 (1964), held that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.* at 536. Accordingly, at several stages during the proceedings be-

5. (Cont'd.)
and corporations: (1) several summonses were served on the corporation's accountant between August 1974 and January 1975 to produce the corporation's work papers; (2) the First National State Bank of New Jersey received at least eight summonses between November 1974 and January 1975, as well as one summons not bearing a date; (3) summonses of unknown number and date were served on the City National Bank in Hackensack; (4) a summons was issued to one Stan Kramer on October 30, 1975, to testify on November 18, 1975. Appellants allege that additional summonses were issued to other persons and entities, but stress that there is no record to establish the identities of the parties and the dates of issuance.

6. Section 7602 provides in pertinent part: "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized— * * * (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other purpose the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ."

low, appellants sought an evidentiary hearing to determine whether the IRS had complied with these requirements.[7] They contended that if the summonses failed to meet the standards set forth in *Donaldson*, any evidence used at trial which was acquired by means of the summoned information should be suppressed. In denying the appellants' motions to suppress and to hold an evidentiary hearing, the trial judge ruled, *inter alia*, that appellants had failed on the record to demonstrate any abuse of process and that even if their allegations could be fully substantiated at an evidentiary hearing, appellants lacked standing to assert their claims under the principles recently announced in *United States v. Miller*, 425 U. S. 435 (1976).

The question of whether or not a taxpayer has standing at trial to attack the validity of a § 7602 summons issued to third parties who voluntarily complied and to have the fruits of an improper summons excluded from evidence has never been addressed directly by this court or by the Supreme Court insofar as we are aware. Previous decisions, of course, have established that the person to whom a summons is issued, whether the taxpayer or a third party, may refuse to comply with the summons, thereby triggering judicial enforcement proceedings at which the legality of the summons can be determined. *Reisman v. Caplin,*

7. Subsequent to pleading not guilty, appellants filed a motion, argued before the district court on July 26, 1976, to suppress all evidence gained by the government through the use of any illegally issued summonses. Appellants also requested an evidentiary hearing to determine conclusively the facts surrounding the issuance of the summonses. The district court denied the motion to suppress and refused to grant an evidentiary hearing. The request for a hearing was renewed by letter dated August 16, 1976. Following their convictions, appellants, on January 5, 1977, again petitioned for a hearing. On February 4, 1977, the trial judge filed a letter opinion denying appellants' request on the grounds, *inter alia*, that the district court no longer had jurisdiction over the matter, *United States v. Ellenbogen*, 390 F. 2d 537, 542-43 (2d Cir. 1968), *cert. denied*, 393 U. S. 918 (1969), and that in any event appellants lacked standing to attack the validity of the summons.

supra; Donaldson v. United States, supra.[8] Where an administrative summons is issued to a third party, such as the taxpayer's bank, the taxpayer may attempt to restrain voluntary compliance by the third party,[9] assuming that he is aware of the issuance of the summons prior to compliance,[10] and he may challenge the validity of the summons by attempting to intervene in the ensuing enforcement proceedings.[11]

8. Section 7602 does not provide the IRS with the power to enforce its own summonses. To compel compliance with a summons, the IRS must bring an enforcement proceeding in a federal district court. 26 U. S. C. §§ 7402(b), 7604(a). Such an enforcement action is "an adversary proceeding affording a judicial determination of the challenges to the summonses and giving complete protection to the witness." *Reisman v. Caplin, supra,* at 446.

9. This procedure was suggested by the *Reisman* court, which held that "third parties might intervene [in enforcement proceedings] to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he too may intervene . . . . Nor would there be a difference should the witness indicate . . . that he would voluntarily turn the papers over to the Commissioner. If this be true, either the taxpayer or any affected party might restrain compliance . . . until compliance is ordered by a court of competent jurisdiction." 375 U. S. at 449-50 (citations omitted); *see Donaldson v. United States, supra,* at 519-20; *Callahan v. First Pennsylvania Bank,* 422 F. Supp. 1098 (E. D. Pa. 1976).

10. Prior to the recent enactment of 26 U. S. C. § 7609 (*see* note 11 *infra*), the IRS was not required to give notice to the taxpayer under investigation that a summons had been served on a third party. *United States v. Continental Bank & Trust Co.*, 503 F. 2d 45 (10th Cir. 1974); *Application of Cole,* 342 F. 2d 5 (2d Cir. 1965).

11. The taxpayer's right to intervene in enforcement proceedings is permissive only and not mandatory, *Donaldson v. United States, supra,* at 529-31. However, under 26 U. S. C. § 7609, added by the Tax Reform Act of 1976 (Pub. L. 94-455, 90 Stat. 1699-1702), taxpayers must be notified by the IRS that a summons has been issued to a third party and they are entitled as of right to stay voluntary compliance and to intervene in enforcement proceedings. Section 7609 applies only to summonses issued after February 28, 1977, and is thus inapplicable to the instant case. Pub. L. 94-455, § 1205(c), as amended by Pub. L. 94-528 § 2(b), 90 Stat. 2483.

As for the grounds upon which the person summoned or the intervenor may attack the summons in the enforcement proceeding, *Reisman* held that one proper defense is "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." 375 U. S. at 449. This statement was construed in *Donaldson* to mean that judicial enforcement of a summons may be denied only where the *sole* object of the investigation is to gather data for a criminal prosecution, *id.* at 553, and that a summons would thus be enforced if issued in "good faith" and "prior to a recommendation for criminal prosecution." *Id.* at 536.

Most recently, in *United States v. LaSalle National Bank*, — U. S. —, 46 U. S. L. W. 4713 (U. S. June 19, 1978) (No. 77-365), the Supreme Court explained the *Donaldson* test as follows:

> In summary, then, several requirements emerge for the enforcement of an internal revenue summons. First, the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution, which reasonably would relate to the subject matter of the summons, be undertaken. Second, the Service at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602. This second prerequisite requires the Service to meet the *Powell* standards of good faith.[12] It also requires that the Service not abandon in an institutional sense . . . the pursuit of civil tax determination or collection.

12. In *United States v. Powell*, 379 U. S. 48 (1964), the Court stated that the IRS "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.

Id. at 4718 (footnote omitted). Thus, according to *LaSalle*, the IRS may not in good faith, by means of § 7602 summonses, gather evidence solely for a criminal investigation.[13] Whether an investigation has solely criminal purposes is to be determined not merely by reference to the intent of the agent issuing the summons, but by "an examination of the institutional posture of the IRS." *Id.*[14]

In *United States v. McCarthy*, 514 F. 2d 368 (3d Cir. 1975), this court carefully formulated procedural guidelines for use in enforcement proceedings and provided that an evidentiary hearing is an "integral part" of those pro-

13. Although it emphasized the interrelated criminal and civil nature of IRS investigations, the Court stated: "The Service does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress. In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only: for 'ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability.' Congress therefore intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens. Consequently, summons authority does not exist to aid criminal investigations solely. . . . We . . . could uncover nothing in the Code or its legislative history to suggest that Congress intended to permit exclusively criminal use of summonses. As a result, the IRS employs its authority in good faith when it pursues the four purposes of § 7602, which do not include aiding criminal investigations solely." 46 U. S. L. W. at 4718 n. 18.

14. Determining that "[n]othing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation," *id.* at 4717, the Court stressed that the IRS would not be proceeding in good faith if it delayed in submitting a recommendation to the Justice Department when there was an institutional commitment to make the referral and the IRS merely desired to gather additional evidence for the prosecution, or if the IRS became "an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases." *Id.* at 4718.

ceedings. Under *McCarthy*, the IRS must be prepared to make a preliminary showing that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose, that the information sought is not already in the government's possession, and that the government has followed the procedural steps required by the Internal Revenue Code. The burden then shifts to the opposing party to establish any defenses or to prove that enforcement would constitute an abuse of the court's process.[15] If the district court concludes that it cannot fairly decide the case on the record before it, it may direct further proceedings, including discovery, if requested. *Id.* at 372-73. *See United States v. Cortese*, 540 F. 2d 640 (3d Cir. 1976); *United States v. First National State Bank of New Jersey*, 540 F. 2d 619 (3d Cir. 1976), *cert. denied*, 431 U. S. 954 (1977); *United States v. Lafko*, 520 F. 2d 622 (3d Cir. 1975).[16] Other courts have established similar procedures. *See United States v. Wright Motor Company*, 536 F. 2d 1090 (5th Cir. 1976); *United States v. Zack*, 521 F. 2d 1366 (9th Cir. 1975); *United States v. Church of Scientology*, 520 F. 2d 818 (9th Cir. 1975); *United States v. Turner*, 480 F. 2d 272 (7th Cir. 1973); *United States v. Salter*, 432 F. 2d 697 (1st Cir. 1970).

15. The burden is on the taxpayer to negate the existence of a proper civil purpose. *United States v. Fisher*, 500 F. 2d 683 (3d Cir. 1974), *aff'd* 425 U. S. 391 (1976); *United States v. Bowman*, 435 F. 2d 467 (3d Cir. 1970); *United States v. DeGrosa*, 405 F. 2d 926 (3d Cir.), *cert. denied*, 394 U. S. 973 (1969). The Supreme Court has characterized this burden as "heavy." *United States v. LaSalle National Bank, supra*, 46 U. S. L. W. at 4718.

16. The *McCarthy* court stated: "Although our proposed procedure for summons enforcement contemplates that provision for an evidentiary hearing be an integral part of the proceedings, implicit in our design is the realization that not every summons enforcement proceeding will require an evidentiary hearing. Thus, if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required; the matter can be decided on the pleadings." 514 F. 2d at 373.

In the instant case, however, none of the third parties upon whom summonses were served contested their validity in court. Because the third parties voluntarily complied with the summonses, no enforcement proceedings were ever instituted by the IRS. Moreover, since appellants, at least in most instances, apparently had no knowledge that summonses had been issued until after the third parties had complied,[17] they were unable to stay compliance and thereby necessitate the institution of enforcement proceedings in which they might have intervened.

Nevertheless, appellants rely upon *Donaldson v. United States* and *United States v. Friedman* for the proposition that even where the third party voluntarily complies with a § 7602 summons, the taxpayer's right to challenge the validity of the summons is preserved at the trial level. In *Donaldson*, the IRS issued § 7602 summonses to Donaldson's former employers for the production of the employers' business records relating to Donaldson's employment. Donaldson obtained a court order staying compliance by the third parties. The IRS sought judicial enforcement of the summonses, and Donaldson moved to intervene, alleging in part that the IRS investigation was criminal in nature. The Court upheld the district court's denial of Donaldson's motion to intervene on the grounds that intervention was a permissive, not a mandatory right, and that Donaldson's interest, when balanced against the need to facilitate IRS investigations, was of insufficient magnitude to warrant intervention: "Donaldson's only interest—and of course it looms large in his eyes—lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes. This asserted interest, however, is nothing more than a desire by Donaldson to

17. *See* note 30 and accompanying text *infra*.

counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records. The nature of the 'interest' urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the government obtained it by other routine means, such as by Acme's independent and voluntary disclosure prior to summons, or by way of identifiable deduction in Acme's own income tax returns, or through Mercurio's appearance as a trial witness, or by subpoena of the records for trial. This interest cannot be the kind contemplated by [Federal Rule of Civil Procedure] Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest." 400 U. S. at 531. However, the Court continued: "And the taxpayer, to the extent that he has such a protectable interest, as, for example, by way of privilege, or *to the extent he may claim abuse of process, may always assert* that interest or *that claim in due course at its proper place in any subsequent trial.* Cf. *United States v. Blue*, 384 U. S. 251 (1966)." *Id.* at 531 (emphasis added). Thus, the *Donaldson* Court, in its effort to facilitate the investigatory mandate of the IRS, merely postponed until trial the time at which a taxpayer can demand adjudication of the propriety of a third party summons.[18]

18. Several courts have perceived that the *Donaldson* Court's recognition that the taxpayer can raise his claims of abuse of process at trial was a significant factor in its decision to limit his opportunity to raise those claims during the investigatory stage. In *Garrett v. United States*, 511 F. 2d 1037 (9th Cir. 1975), the district court denied the taxpayer's permission to intervene in an enforcement action brought by the IRS to compel compliance with a summons served on the taxpayers' bank. In affirming, the Court of Appeals for the Ninth Circuit stated that the district court "was not required to allow intervention, and the attendant discovery procedures necessary to support the allegations, to delay the investiga-

In *Friedman*, the IRS brought an enforcement action to compel compliance with summonses issued to third parties in connection with an investigation into taxpayers' liability. The taxpayers were permitted to intervene, and they attempted to resist enforcement on the ground that the summonses sought evidence for a criminal prosecution. The district court ordered the summonses enforced and the taxpayers appealed. The taxpayers were unable to obtain a stay of the enforcement orders pending appeal and the third parties complied with the summonses. Because of this compliance, the IRS moved to dismiss as moot the appeal from the enforcement orders. In refusing to dismiss the appeal, this court stated: "Although Friedman has complied with the court's order, the legality of that order is still being challenged by the taxpayer intervenors. *If the taxpayers were to prevail in their contention that all summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution, then the records acquired from Friedman would have been obtained unlawfully. Such a ruling could affect the possible use of these records in any subsequent criminal or civil proceeding brought against the*

18. (Cont'd.)
tion into taxpayers' tax liabilities, *because*, as the Court pointed out in *Donaldson*, 'the taxpayer, to the extent . . . that he may claim abuse of process, may always assert . . . that claim in due course at its proper place in any subsequent trial.'" *Id.* at 1038 (emphasis added). Moreover, the court in *United States v. Newman*, 441 F. 2d 165 (5th Cir. 1971), in denying the taxpayer's motion to intervene in enforcement proceedings, noted that in *United States v. Powell*, 379 U. S. 48 (1964), the Court analogized an investigation by the IRS to one conducted by a grand jury or the Federal Trade Commission in that a person can be denied certain adjudicatory rights in light of the government's need to investigate and inquire. But the *Newman* court continued: "An important factor back of this approach is of course the fact that if accusatory proceedings are begun the person concerned 'will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding . . . .' And this applies in the context of an IRS summons situation as *Donaldson* makes clear." *Id.* at 174 (citations omitted).

taxpayers . . . . We conclude that the motion to dismiss the appeal . . . should be denied because the controversy over these records is still very much alive." 532 F. 2d at 931 (emphasis added).

Although the trial judge in the instant case conceded that appellants' claims may have been viable prior to the Supreme Court's decision in *United States v. Miller,* 425 U. S. 435 (1976), he held that *Miller* deprived appellants of any standing which they might claim under *Donaldson* and *Friedman* to assert at trial that administrative summonses directed to third parties who voluntarily complied were legally defective. In *Miller,* respondent made a pretrial motion to suppress copies of bank records relating to his accounts at two banks, both of which maintained the records pursuant to the Bank Secrecy Act of 1970 (Act), on the grounds that the grand jury subpoenas *duces tecum* used to obtain the records were defective [19] and that the records had thus been seized in violation of the Fourth Amendment. The district court denied the motion to suppress, but the court of appeals reversed, holding that a depositor's Fourth Amendment rights were violated when bank records maintained under the Act are obtained by means of a defective subpoena and that evidence so obtained must be suppressed. The Supreme Court reversed on the ground that the Act created no Fourth Amendment rights in the depositor and that therefore respondent possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.[20] The Court

19. Respondent argued that the subpoenas were defective because they were issued by a United States Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. 425 U. S. at 439.

20. The Court declined to consider the government's contentions that the appeals court erred in holding that the subpoenas were defective and that suppression was the appropriate remedy if a constitutional violation did occur. 425 U. S. at 440.

stated: "Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn. v. Shultz,* 416 U. S. at 53; *Donaldson v. United States,* 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it was firmly settled, before the passage of the Bank Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation. See *First National Bank v. United States,* 267 U. S. 576 (1925), aff'g 295 F. 142 (S. D. Ala. 1924). See also, *California Bankers Assn. v. Shultz, supra,* at 53; *Donaldson v. United States,* 400 U. S., at 522." 425 U. S. at 444. In holding that respondent lacked "the requisite Fourth Amendment interest" to contest the validity of the subpoenas, the Court noted that there was "no occasion for us to address whether the subpoenas complied with the requirements outlined in *Walling.* The banks upon which they were served did not contest their validity." *Id.* at 446 n. 9.[21]

The trial judge in the instant case characterized *Miller* as a "standing" case and ruled that just as Miller, in the absence of a constitutionally based interest, lacked standing to press his challenge to the validity of the subpoenas, so defendants herein "simply lack standing . . . to assert a claim that an administrative summons directed at a third

21. In *Oklahoma Press Publishing Company v. Walling,* 327 U. S. 186 (1946), the Court stated that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208.

party (who thereafter complied voluntarily) was defective." According to the trial judge, any assertion of standing based upon *Donaldson* and *Friedman* was "washed away" in the wake of *Miller*. In so holding, the trial judge relied upon the recent decision of *United States v. Sand*, 541 F. 2d 1370 (9th Cir. 1976), in which the Court of Appeals for the Ninth Circuit stated: "Both defendants sought to exclude Sand's bank records which the government obtained from several banks by using civil tax summonses. The crux of their objections was that the IRS investigation was from its inception criminal and that the use of IRC § 7602 summonses in aid of a solely criminal investigation was improper, citing *Donaldson v. United States*, 1971, 400 U. S. 517, 531-36, 91 S. Ct. 534, 27 L. Ed 2d 580. However, the Court held in *United States v. Miller*, 425 U. S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), that *a depositor has no standing to challenge an IRS summons directed at his bank. Id.* at [444], 96 S. Ct. 1619. Hence, the district court was correct in denying the motion to suppress." 541 F. 2d at 1374 (emphasis added). *Cf. United States v. Herndon*, 536 F. 2d 1027 (5th Cir. 1976).

We decide, however, that *Miller* does not deprive the appellants of standing in this case and that *Sand* erroneously misconstrued the breadth of *Miller*'s holding. The *Miller* court was not faced with the question of whether or not a taxpayer has standing to contest the legality of a § 7602 summons. Rather, *Miller* dealt only with a Fourth Amendment challenge to an allegedly improper grand jury subpoena. It appears that Miller's claim of defectiveness was intertwined with his Fourth Amendment argument,[22]

22. As the *Miller* Court stated: "Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a *defective* subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a

and the Court appropriately framed its holding in constitutional terms.[23] Because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *Alderman v. United States*, 394 U. S. 165, 174 (1969), the Court did not have to reach the question of the validity of the subpoenas since only the banks, under a traditional Fourth Amendment analysis, had standing to raise it.[24]

In the instant case, however, appellants' standing to challenge administrative summonses derives not from the Fourth Amendment,[25] but rather from a federal statute, § 7602, and from the gloss placed upon that statute by the federal courts. We think that in consistently holding that the IRS may not use administrative summonses to gather evidence in an exclusively criminal investigation, the courts from *Reisman* and *Donaldson* onward, up to and including *LaSalle*, have identified a protectable interest in the tax-

22. (Cont'd.)
Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank." 425 U. S. at 441 n. 2.

23. Indeed, this court has described *Miller* as follows: "Miller urged that he had a *Fourth Amendment* interest in the records kept by the banks, as copies of personal records made available to the banks for a limited purpose. However, the Supreme Court, after considering the standards enunciated in *Katz v. United States* . . . and *Couch v. United States*, . . . found *no legitimate expectation of privacy* in the contents of records maintained by the banks under the mandate of the Act . . . ." *Gannet v. First National State Bank of New Jersey*, 546 F. 2d 1072 (3d Cir. 1976), *cert. denied*, 431 U. S. 954 (1977) (emphasis added).

24. In *Alderman v. United States, supra*, the Court stated that the "established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." 394 U. S. at 171-72. *See United States v. Miller, supra*, at 456 (Marshall, J., dissenting).

25. Appellants expressly deny any Fourth Amendment interest in the summoned materials.

payer not to be the target of an exclusively criminal investigation in which government agents have acted beyond their statutory authority. If the civil limitation placed upon § 7602 summonses is not for the taxpayer's benefit, we have difficulty in discerning the party for whose protection it was designed. While the third party recipients of summonses may well be motivated to refuse to comply on the grounds that the summonses are overbroad or unreasonably burdensome, *see e.g., United States v. Friedman, supra,* at 931, 933-34; *United States v. Dauphin Deposit Trust Co.,* 385 F. 2d 129 (3d Cir. 1967), *cert. denied,* 390 U. S. 921 (1968), there is little reason to expect them to raise the defense that the summonses were issued to further a solely criminal investigation of the taxpayer. *Cf. United States v. Continental Bank & Trust Co.,* 503 F. 2d 45 (10th Cir. 1974). This is not a matter of the third party bank's interest, but of the taxpayer's. Thus, the courts have provided that the taxpayer may challenge the validity of a summons issued to a third party either at the investigatory stage or, if necessary, at the trial level. *Reisman v. Caplin; Donaldson v. United States; United States v. LaSalle National Bank; United States v. Friedman; United States v. Lafko; United States v. McCarthy, supra.*

As has frequently been noted, the rationale of these cases derives from the distinct roles traditionally accorded the investigatory functions of the grand jury, on the one hand, and the IRS, on the other hand. Grand jury subpoenas, such as those involved in *Miller,* are used to garner evidence to be presented to a federal grand jury, whose sole purpose is to investigate criminal activity. It is exclusively a criminal investigatory tool. But an IRS administrative summons is a process essentially civil in character. While a summons may result in obtaining evidence which might ultimately find its way to a grand jury, the statutory authority for its issuance is civil and the

evidentiary objective at the time of its issuance must be civil in nature. Thus, the grand jury apparatus has traditionally been the means by which evidence required to form the basis of a contemplated criminal charge can be compulsorily produced, and the courts, in construing § 7602, have identified a protectable interest, assertable by the taxpayer, in preventing the IRS from encroaching upon what has traditionally been the sole province of the grand jury.[26]

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26. In *United States v. Friedman,* this court, noting that the IRS has no authority to conduct a criminal investigation through the use of a § 7602 civil summons, explained as follows: "No court has given a thorough or persuasive justification for this construction of 26 U. S. C. § 7602 which appears to have originated in an opinion by Judge Wyzanski in *United States v. O'Connor,* 118 F. Supp. 248 (D. Mass. 1953), and to have been assumed, rather than explained, ever since. Judge Wyzanski reasoned: 'The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization . . . .' 118 F. Supp. at 250-51. The paragraph has a nice ring, but it ignores the reality that grand jury subpoenas are issued as a matter of course by the Department of Justice, not by the grand jury. *See In re Grand Jury Proceedings,* 486 F. 2d 85 (3d Cir. 1973). It is hard to imagine why Congress could not entrust criminal law enforcement of the Internal Revenue Code to an executive branch department rather than or in addition to the Justice Department. The difference between a summons returnable before an IRS agent and a subpoena returnable before a grand jury is in the real world slight.

"The critical question, however, is what Congress intended in § 7602 and its predecessors, as well as in 26 U. S. C. § 7801(a) which authorizes the Secretary of the Treasury to administer and enforce the provisions of the Internal Revenue Code. The Intelligence Division of the IRS is organized to carry out the broad enforcement responsibilities of the Treasury Secretary under § 7801(a). Since Judge Wyzanski's opinion in 1953, no case which has addressed the issue of the scope of a § 7602 summons has explored the legislative intention in any depth. Nor do we, since the *United States v. O'Connor* construction has been accepted by the Supreme Court. *See, e.g., Donaldson v. United States, supra,* at 533." 532 F. 2d at 932 n. 9.

Were *Miller* to be held dispositive of the present case, serious doubt would be cast upon those decisions, including *Donaldson* and *LaSalle,* which hold that IRS summonses are improper if used in furtherance of an IRS investigation conducted solely for criminal purposes, since, as stated above, that limitation makes little sense if the taxpayer—the only party properly motivated to challenge the summons on the ground of illegality—is not permitted to do so. *Miller,* however, by its very terms suggests that it was not intended to disturb the vitality of *Donaldson.* The *Miller* Court referred to *Donaldson* only for the proposition that "an IRS summons directed to a third party bank does not violate the *Fourth Amendment* rights of a depositor under investigation." 425 U. S. at 444 (emphasis added). Even at the time *Donaldson* was decided, as the *Miller* Court notes, it was well established that the issuance of a summons to a third party does not violate the taxpayer's Fourth Amendment rights. *See Donaldson,* 400 U. S. at 522. *Donaldson* itself was a case involving no Fourth Amendment claims whatsoever. *Id.* Thus, the *Miller* Court compared its ruling to *Donaldson* only in the sense that neither § 7602 summonses nor grand jury subpoenas issued to third parties are vulnerable to Fourth Amendment challenges by taxpayers. But *Miller* did not purport to cast doubt on *Donaldson*'s conclusion that even where there is no Fourth Amendment challenge to a summons involved, "the taxpayer . . . to the extent he may claim abuse of process, may always assert . . . that claim in due course at its proper place in any subsequent trial."

26. (Cont'd.)

In *United States v. LaSalle National Bank, supra,* the Court emphasized that "[n]othing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation." 46 U. S. L. W. at 4717.

Having concluded that *Miller* does not bar appellants' standing to assert at trial the illegality of § 7602 summons, we must next examine appellants' contentions that if, on remand, a hearing is granted and abuse of the summons process is found, the proper remedy is the suppression of any evidence and the fruits thereof obtained by virtue of the illegal summonses. The trial judge ruled, and the government contends on appeal, that the drastic remedy of suppression, controversial enough where constitutional violations are urged, is improper where the violations complained of are merely statutory in character. We think, however, that *Donaldson* and *Friedman,* cited by appellants, clearly envision such a remedy. In *Friedman,* this court stated that proof that a § 7602 summons had been invalidly issued "could affect the possible use [of the summoned records] in any subsequent criminal or civil proceeding brought against the taxpayers." 532 F. 2d at 936. Moreover, *Donaldson* cited *United States v. Blue,* 384 U. S. 251 (1966), as support for the proposition that the taxpayer could always assert a claim of abuse of process in any subsequent trial. 400 U. S. at 517. In *Blue,* the Court stated: "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, *federal statutes,* or federal rules of procedure." 384 U. S. at 255 (citations omitted) (emphasis added).[27]

27. In one of the cases cited by *Blue* for this proposition, *Nardone v. United States,* 308 U. S. 338 (1939), evidence procured by wiretapping in violation of the Communications Act of 1934 was

Other courts, as well, have found suppression to be a theoretically proper remedy to cure governmental violations of the Internal Revenue Code. In *United States v. Oaks*, 360 F. Supp. 855 (C. D. Cal. 1973), defendant taxpayer moved to suppress information acquired pursuant to § 7602 summonses on the ground that the summonses were employed for the improper purpose of furthering a solely criminal investigation. The court, without questioning the propriety of the remedy of suppression, denied the taxpayer's motion only because it found on the facts before it that the summonses complied with the *Donaldson* standards. *See United States v. Fruchtman*, 421 F. 2d 1019 (6th Cir.), *cert. denied*, 400 U. S. 849 (1970). In *Application of Leonardo*, 208 F. Supp. 124 (N. D. Cal. 1962), which involved a claim by taxpayers that the IRS had violated 26 U. S. C. § 7605(b), the court, in ordering suppression, held that "apart from the claim of violation of constitutional rights, it is our view that this court can and should grant relief through an adequate and appropriate remedy to safeguard these petitioners from what we deem to be an abuse of the statutory process." *Id.* at 126-27.[28] A similar view

27. (Cont'd.)
held inadmissible at trial. The *Nardone* Court stated: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land . . . . [T]wo opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated." *Id.* at 340.

28. In *United States v. House*, 524 F. 2d 1035 (3d Cir. 1975), this court declined to decide whether a violation by the government of § 7605(b) is a ground for a suppression motion in a criminal case because it found on the record that no § 7605(b) violation had occurred. *Id.* at 1043; *see United States v. Dawson*, 400 F. 2d 194 (2d Cir. 1968), *cert. denied*, 393 U. S. 1023 (1969).

was espoused by the court in *United States v. Avila*, 227 F. Supp. 3 (N. D. Cal. 1963), which stressed that "[a]lthough the so-called 'fruit of the poisonous tree' doctrine has generally been applied in cases involving searches in violation of the Fourth Amendment . . . , the doctrine can be applied to searches in violation of a statutory right." *Id.* at 6, *citing Nardone v. United States*, 308 U. S. 338 (1939). In an analogous context, the court in *Moloney v. United States*, 375 F. Supp. 737 (N. D. Ohio 1974), stated: "The Government also argues that [26 U. S. C. § 3631] does not contain any sanctions for such a violation as occurred here. The Court is not inclined to render the section nugatory because it does not state explicitly that no assessment of deficiency can be made on the basis of an inspection forbidden by the section. Such a result is implicit in the statute. Otherwise it would be completely meaningless." *Id.* at 741.

To make available the remedy of suppression to taxpayers in cases such as the present is merely to ensure governmental compliance with the principles enunciated in *Reisman, Donaldson, LaSalle*, and the decisions of this circuit: the IRS, in issuing administrative summonses under § 7602, may not act outside its statutory authority by garnering evidence in furtherance of a solely criminal investigation. If a court determines in the context of enforcement proceedings that a summons was illegally issued, it will deny enforcement of the summons. 400 U. S. at 533. That summons is no less illegal merely because it escapes detection at the investigatory stage. The prophylactic principles which operate at the enforcement level are equally appropriate to the trial stage, and suppression is the only practical remedy at that point to cure the statutory abuse.[29]

29. On several occasions the Supreme Court has stressed that a primary justification for the exclusionary rule, at least in the context of the Fourth Amendment, is the deterrence of illegal govern-

In an analogous situation, the Supreme Court stressed that the preliminary stages of criminal prosecutions must be pursued in strict obedience to both the Constitution and the laws of the United States. In *Abel v. United States,* 362 U. S. 217 (1960), the Court was called upon by the defendant to adjudicate the claim that the government had used an administrative warrant, which could be used only to detain a person who was to be deported, for an entirely illegitimate purpose. The defendant asserted that the purpose was to place him in custody so that pressure might be brought to bear on him and to permit the government to search through his belongings for evidence of alleged espionage. The defendant argued that the articles seized as a consequence of the use of this illegal administrative warrant should have been suppressed. The Court stated: "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." 362 U. S.

29. (Cont'd.)
ment conduct. *See, e.g., Stone v. Powell,* 428 U. S. 465 (1976); *United States v. Calandra,* 414 U. S. 338 (1974); *United States v. Elkins,* 364 U. S. 206 (1960). Suppression in cases such as the present furthers this policy even though 26 U. S. C. § 7609, added by the Tax Reform Act of 1976, now statutorily provides an opportunity for targets of IRS investigations to intervene at enforcement proceedings and to have notice of summonses issued in connection with an investigation of his activities. Section 7609 does not explicitly speak to the taxpayer's rights at the trial level, but the legislative history suggests that even if a taxpayer chooses not to intervene he may still raise his claims in a subsequent trial. *See* text accompanying note 31 *infra.* Thus, assuming that a taxpayer did not intervene at the investigatory stage, suppression at trial would be the only remedy capable of ensuring governmental compliance with § 7602.

at 226. The Court stressed that the issues were fully explored by the court below and crucial facts were found against defendant. Accordingly, it was precluded from making a finding of bad faith on that record. However, the Court again noted: "We emphasize again that our view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding." *Id.* at 230.

In sum, although § 7602 does not expressly restrict the power to issue a summons thereunder as long as the purpose is to ascertain the correctness of any return and the material sought is relevant to such inquiry, *LaSalle, Donaldson, Friedman,* and the other cited decisions have promulgated a judicial policy, binding on the IRS, to protect a taxpayer from any attempt on the part of the IRS to obtain evidence by use of § 7602 summonses after the IRS recommends prosecution to the Department of Justice or after the IRS has abandoned in an institutional sense, the pursuit of civil tax determination or collection. The only effective remedy for violation of that policy is to require suppression of evidence obtained as the evidentiary fruits of an illegal summons.

The government, however, contends that even if the remedy of suppression is theoretically available to taxpayers, it is an inappropriate remedy under the circumstances of this particular case. First, the government implies that appellants have "waived" any opportunity to seek suppression of evidence at trial because they knew of the issuance of at least some of the summonses prior to the third parties' compliance and failed to request the court to stay such compliance or to seek other judicial re-

lief at that earlier stage. In *United States v. House, supra,* this court, considering a claim that evidence obtained in alleged violation of 26 U. S. C. § 7605(b) should be suppressed, stated: "Moreover, if the taxpayers had felt aggrieved by the proposed visits to Spuler's office or their own, they could have resisted them and forced the Internal Revenue Service to resort to a subpoena. If they had, they would have obtained judicial review of both the necessity for a notice and the propriety of a second examination. We can hardly countenance as a ground for suppression an examination to which the taxpayer, having available alternatives, consented." 524 F. 2d at 1043-44.

The record in the present case is unclear as to the precise extent of appellants' knowledge of the issuance of the summons.[30] However, assuming *arguendo* that appellants were aware, prior to compliance, that summonses had been issued to third parties, and that they failed, intentionally or otherwise, to institute judicial proceedings at that point in time, we do not think this would necessarily

30. On January 17, 1975, prior to indictment, trial counsel for Forman wrote to the IRS Special Agent investigating their activities and requested that defendants be notified by the IRS of any summonses it intended to serve so that he could challenge them, if appropriate. On May 8, 1975, the Special Agent replied by letter that he would not advise appellants of any summonses issued to third parties. Nevertheless, the record of the pre-trial proceedings suggests that appellants were aware of some summonses prior to compliance and in time to attempt to institute the stay and intervention procedures outlined in *Reisman* and *Donaldson*. In the January 17, 1975, letter to the IRS, trial counsel for Forman stated that he had advised one of the third party banks not to comply with a summons dated January 13, 1975. It appears that no judicial action was ever initiated to restrain compliance. Moreover, on one occasion, counsel for Forman attempted to attend physically an IRS interview of the Corporation's accountant, who had been summoned to appear, but he was asked to leave. On the whole, however, appellants maintain that they had no knowledge of most of the summonses until after compliance and stress that even at this late date they have no precise indication as to whom and when all the summonses were served.

bar them from asserting a claim of abuse of process at trial. *Donaldson* indicated that the taxpayer can attack the validity of the summons at trial even though he has sought and been denied intervention, and it nowhere suggests that the taxpayer must exhaust his pre-indictment remedies before proceeding at the trial level. *See Garrett v. United States,* 511 F. 2d 1037 (9th Cir. 1975); *United States v. Newman,* 441 F. 2d 165 (5th Cir. 1971). We note, in addition, that the Senate Report accompanying 26 U. S. C. § 7609, added by the Tax Reform Act of 1976, which gives taxpayers the statutory right to stay voluntary compliance and intervene in enforcement proceedings, states that where the taxpayer *"does not request* the third party witness not to comply at this stage, *he would still be permitted to assert such defenses* as may be available to him with respect to any evidence obtained pursuant to the summons in any later court action in which the [taxpayer] was directly involved (i.e., affecting his tax liability or any criminal charges which might be brought) *to the same extent as may be permitted under present law."* Senate Report No. 94-938, 94th Cong., 2d Sess. 370 (1976) (emphasis added).[31]

Finally, the government asserts that as a practical matter suppression would gain the appellants nothing in the case. According to the government, grand jury subpoenas were issued to many, if not all, of the same parties who received administrative summonses. The only "taint" which the appellants can claim, urges the government, is that the "identities" of the subpoenaed third parties were

31. Similarly, one 1975 Congressional report, summarizing the administrative procedures of the IRS prior to the 1976 Tax Reform Act, states that "a taxpayer who *either does not attempt to intervene or restrain or who fails in his attempt* may assert his rights when the government subsequently attempts to use the material against him." Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States (October 1975), 94th Cong., 2d Sess. 755 (emphasis added).

learned by way of the summonses and that the subpoenas were therefore fatally infected. The government stresses that this claim is without merit because the fact that the summonses themselves were served on the third parties demonstrates that their identities were already known prior to the issuance of the summonses. However, the present record contains no complete accounting of the dates of the subpoenas or the summonses or of the parties on whom they were served. While the government may well be able to establish an independent, "taint-free" basis for its evidence, *see Wong Sun v. United States,* 371 U. S. 471 (1963), we are unable to so conclude on the record before us. "Statements made by counsel in their briefs are not evidence." *United States v. Howard,* 360 F. 2d 373 (3d Cir. 1966).

We thus conclude that the trial judge erred in ruling that as a matter of law appellants lacked standing to attack the validity of the summonses and to supress the illegally obtained evidentiary fruits thereof. Accordingly, in light of the allegations of governmental impropriety raised by appellants, we shall remand this case to the district court with instructions to conduct an evidentiary hearing [32] and

32. The government suggests that appellants may have waived their right to an evidentiary hearing by failing to object to the trial court's refusal of their request. The following colloquy occurred at the hearing on defendants' motion to suppress:

"Mr. Zuckerman: Your honor, I don't know whether it is appropriate or not, but in the event that there is error in any of your Honor's ruling, would it be appropriate to have evidential findings or to have a hearing before the trial in this case as to what the facts were, what was secured after the 6(e) order and what evidence was secured under the summonses after a certain date? Because I think—I can see an Appellate Court speculating as to what we are talking about?

"The Court: I know. I want to be fair. That is why I asked you whether you wanted anything more on the record. But you see I am in this position. It is very hard for me to make that kind of record pre-trial without conducting a pretrial trial.

to certify to this court its findings of fact and conclusions of law as to whether the government fully complied with the requirements of 26 U. S. C. § 7602, as judicially interpreted, and if not, whether suppression is required. We note that the trial judge did not have the benefit of the Supreme Court's opinion in *United States v. LaSalle National Bank* at the time he rendered his decision, and the present record is insufficient to permit us to determine conclusively whether or not the IRS summonses were issued in good faith and prior to a recommendation for prosecution, as those standards are defined in *LaSalle.* Although the government had submitted evidence which allegedly obviates the need for an evidentiary hearing, this evidence apparently was not presented to the district court in the first instance and therefore cannot be considered by this court on appeal. *See Stotter & Co., Inc. v. Amstar Corp.,*

32. (Cont'd.)

"Mr. Zuckerman: That's correct, sir.

"The Court: *That would be a monumental waste of time in the event of an acquittal.*

"Mr. Zuckerman: *I recognize that. It would be a monumental waste of time for the Third Circuit to agree with you in the event of a conviction.*

"The Court: That's correct. If the Third Circuit disagrees with me, they would have the option of remanding it back for an evidential hearing on that limited question.

"Mr. Zuckerman: All right.

"The Court: I don't want to preclude you. Does that make sense to you?

"Mr. Zuckerman: *It makes sense to me. I'm content for the record to state that.*"

166a-168a (emphasis added).

However, in a letter to the trial judge dated August 16, 1976, prior to entry of the order of September 9, 1976, denying defendants' motion to suppress, Mr. Zuckerman explicitly renewed his request for an evidentiary hearing. 198a. We think that under the circumstances defendants properly voiced their objection and preserved their right to appeal the trial judge's denial of an evidentiary hearing.

Nos. 77-1555 & 77-2606 (3d Cir. July 5, 1978), and the authorities cited in *n.* 4 of *Rose Marie Drexel v. Union Prescription Centers, Inc.*, — F. 2d — (3d Cir. 1978).

The case will be remanded for prompt proceedings consistent with this opinion. We retain jurisdiction over this appeal.[33]

33. *See* Internal Operating Procedures for the United States Court of Appeals for the Third Circuit, § L.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 76-146

UNITED STATES OF AMERICA

v.

LESTER GENSER and
LAWRENCE FORMAN,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Newark, New Jersey
November 2, 1978

BEFORE: THE HONORABLE HERBERT J. STERN, *U. S. D. J.*
Appearances: None.

THE COURT: The following constitutes the Court's findings of fact and conclusions of law.

As the Court said at Page 246 of the record, it has, pursuant to Local Rule 28 of the Rules of this Court, made certain grammatical revisions of its oral opinion as would be required.

The documents which I admit now, G-2 through G-6, are in no sense Government documents. They are all communications between the Government and the defense. They do not rise to the same level of internal documents which are protected by Rule 16, Federal Rules of Criminal Procedure. Letters from District Director to defendants,

contracts between defendants, their attorney and the Government can hardly be said to be internal Government documents.

You object to the suggestion that the admission of these documents constitute favoritism to the Government in the respect that they are permitted on the Government's case and not the defense. Indeed, throughout the course of these proceedings the Court attempted to make clear to the United States Attorney that if he either directly or indirectly relied upon or was within his files, to meet the challenge of this hearing, I will order those files over.

Now, I've heard the evidence. I am fallible, for sure, but that my best reading of the Court of Appeals' opinion in this case indicates that they wanted me to act with dispatch. Two things indicate that to me; first, they said "prompt hearing." I think I know what that means. That means that they wanted me to bring this on quickly.

The second thing they did was that they retained appellate jurisdiction, which is an unusual thing to do, because it means the case is really there, not here, except for the limited purpose of me conducting a hearing.

The third thing, I really think there are three things that they did, which is interesting, is that they said I should certify directly to them my findings of fact and conclusions of law. This third aspect, when combined with the second, indicates to me that they intend to exercise continuing jurisdiction, that they want me to do this swiftly, informally if necessary, to get to them my findings as fast as I may so that they can act without the necessity for the usual time limitations which would be required, if instead of retaining appellate jurisdiction they had simply reversed, remanded, then required the refiling of an appeal.

With all deference, I may be wrong, but my best reading of the situation is that the Court of Appeals wishes me to make findings of fact on the record and then that it

be brought back to them forthwith. If we are wrong in this we shall be told, but that's my best reading and that's what I'm going to do.

I'm going to do it promptly therefor. Now, normally the case involves millions of dollars in taxes to the Government, a criminal prosecution which took weeks, a case in which a substantial sentence was meted out to the defendants. Undoubtedly, the Court would feel far more comfortable if it could sit back and take proposed findings, answers to proposed findings, work over an opinion for some months and publish it.

For the reasons I enunciated I don't think the Court of Appeals wants me to do that. And though it might be more comfortable to me personally, I will proceed to find the facts now.

I share Mr. Segal's difficulty in reading the precise commands of the LaSalle case. I've read it many times. There is in that opinion much to comfort all corners of this litigation. It may well be that in the final analysis the appeal in this case is going to turn on the question of how much discovery is permissible, proper or required in the posture of this case. I do not know, I have tried to decide it that way, too, according to my best lights, given the guidance which we have in the LaSalle case.

I am nonetheless convinced and remain convinced, that the law is not that a defendant can walk into court and say I want to check to see whether or not IRS has in bad faith issued summonses, and that in order to do that, I should be granted the opportunity to take a look at all of the internal files, to question the agents, to question their superiors, to bring in the Commissioner of Internal Revenue. I think, at a minimum, under the LaSalle case, a defendant is required to make a showing which would justify that kind of inquiry into what is typically and usually regarded as closed Government files.

In my view, no such showing was made in this case. As a normal matter, I would maybe not even have afforded an evidentiary hearing, I would not even have required the agent to take the stand, in light of the Second Circuit case to which I referred, were it not for the fact that one could read the Court of Appeals opinion in this case in our Circuit as indicating a desire on the part of the Judges of the Court of Appeals that an evidentiary hearing be held.

In deference to that potential reading of the opinion, I have permitted defendants to bring forth such evidence as they may which indicates bad faith, either institutionally, individually or in any way on the part of the Internal Revenue Service, and the issuance of the summonses in this matter.

It seems clear, indeed, I think it is not disputed, that all of the summonses in this case were issued prior to the reference letter from the Internal Revenue Service to the Department of Justice on or about December 12, 1975. It therefore seems clear that one line of inquiry under LaSalle is closed; what remains is somewhat in dispute: The legal standard that should be applicable is not readily ascertainable from a reading of the case.

On the one hand there is language in the case that suggests that prior to the criminal reference letter, which in this case would be December 12, 1975, to meet their burden, the defendants would have to show harassing conduct or improper conduct on the part of the agents in the sense of the Powell case. Powell, it will be remembered, United States versus Powell, was a case before the Supreme Court of the United States on certiorari from the United States Court of Appeals for the Third Circuit.

If my memory serves me, it was written by Mr. Justice Harlan. If my memory serves me as well, it was an

opinion which broadened the power of the Internal Revenue Service to issue summonses, and likened their power to that of a Grand Jury, which, in the words of the Powell opinion, as I recall it, was that a Grand Jury had a power not merely to inquire into crimes, but to inquire to assure themselves that no crime had been committed.

On the other hand, there is language in LaSalle which indicates that the inquiry is not at an end merely by ascertaining that the summonses were issued before the reference, and that there is no evidence of actual harassment. There is language indicating that an inquiry should be made into the institutional posture of the Internal Revenue Service as a thing separate and apart from the intent of the agents.

That language is, candidly speaking, most difficult to apply, for an institution rarely has a posture or intent apart from the people within it. Nonetheless, what I think the Supreme Court was indicating was, that in an appropriate case and upon appropriate showing, that a District Judge should be alerted to make certain that even where no criminal reference letter had yet been made, IRS is not to be permitted to employ its summonses, where there can be no question but its sole purpose is criminal in nature and has no civil aspects to it.

The Supreme Court itself recognized that such a situation is almost impossible because of the dual function that the Internal Revenue Service has, that is, not only to prosecute or to assist in the prosecution and investigations of criminal wrongdoing under the Internal Revenue Act, but also to collect the revenue. Indeed it is almost impossible to conceive of a case where there can be a criminal violation of Statute without civil tax consequences.

This surely is not such a case. Here the defendants were convicted of many counts of fraud and their civil

liabilities, including penalties and interest, according to the Government, amounts to nearly four and a half millions.

Now, against that background the defendants were offered the opportunity to produce such evidence as they had as to the institutional posture of the Internal Revenue Service. The bad faith in the sense of Powell has been put aside by counsel for the defendants as something that they cannot show and have no evidence of.

The question of whether the summonses were issued before or after the criminal reference was also put aside because it is clear that the summonses were all issued before the criminal reference letter. That was not disputed.

Our attention has been confined to the institutional posture of the Internal Revenue Service during the time that Parisi and other agents were issuing the summonses.

Two major pieces of evidence, or to be more precise, three major pieces of evidence have been offered by the defendants to support their claim that the Internal Revenue Service was in such a posture as to make it impermissible to use the summonses.

First, Defendants' Exhibit 1, which is a report authored by Mr. Parisi which reopened certain tax years, that is, the investigation into certain tax years and his notation, in sum and substance, in that memorandum, or report, that he had reason to believe that there was criminal wrongdoing in the affairs of Genser-Forman, and among the agents and representatives of Genser-Forman.

Secondly, we have the report, or the memorandum written by Parisi in connection with his invocation of Grand Jury assistance in furtherance of his investigation when, according to his testimony, he perceived certain persons from whom he desired testimony, pursuant to summonses, and who he believed to be malingering.

Finally, we have the testimony of Mr. Zuckerman, coupled with the denial of Agent Parisi, that when Mr. Zuckerman requested certain records to be returned to the corporation, Agent Parisi, at a time even before the criminal reference letter had been transmitted, instructed Mr. Zuckerman he could not return those records because he had been instructed not to by the United States Attorney.

Let's take each one of these separately.

D-1, which is the report requesting authority to reopen the investigation into tax years 1974, 1973, indicates that the corporation, for those years, based on the information then available to the agent, owed tax in excess of that which was reported of $200,000 for each taxable year.

The report notes that it is the agent's belief that tax deficiency in that amount may well be the product of a criminal conspiracy.

Reason and common sense march along with the conclusions of that report. It is true that not every tax deficiency of $200,000, or even two deficiencies of $200,000, in and of themselves, are conclusive evidence of criminal wrongdoing. But when an agent has reason to believe that a taxpayer, be it a corporate individual, has understated income taxes due by an amount of $200,000, I suppose such an agent may well have reasonable grounds to believe that there has been criminal wrongdoing as well as civil taxes owed.

The law does not require that on the state of such knowledge the Internal Revenue Service must abandon all efforts to collect the civil taxes which are due any more than they are required to abandon investigation into potential criminal wrongdoing.

This Court holds that no such election is required. The Court further holds that an agent, armed with that kind of information, has the right and the power under the

law to issue summonses to investigate both avenues and aspects of the case; that is, both criminal and civil consequences. It was the agent's testimony that he had that dual purpose in investigating, and the Court believes him.

The Court finds, on the state of this record, that Agent Parisi, at the time he wrote that report, had in mind both the collection of revenue and criminal prosecution. And to the extent that one can determine the Internal Revenue Service's institutional posture at that moment, that institutional posture of the Internal Revenue Service had an abiding interest in both the criminal and civil tax aspects of the investigation which Agent Parisi was undertaking.

I now pass on the second aspect. Agent Parisi testified, and the memoranda beared him out, that there came a time when he evoked the procedures of the Internal Revenue Service Manual which permits the Service to seek aid of the Department of Justice in pursuing an investigation. It is clear that he did that.

The Court finds that Agent Parisi, both at the time he wrote D-1 and at the time that he invoked the procedures of the Manual which permitted him to seek aid from the Department of Justice was indeed vigorously pursuing a criminal tax investigation.

The Court also finds that the evidence establishes that the Internal Revenue Service was still very much interested in pursuing, and was, in fact, pursuing the civil taxes which were due and owing.

The mere fact that the procedure authorized by Manual was invoked by the agents does not convert a civil and a criminal investigation into a criminal investigation alone.

Finally, we have the evidence from Mr. Zuckerman which indicates that prior to the criminal reference letter written by the Internal Revenue Service to the Department of Justice, in a conversation between himself and Agent Parisi, Agent Parisi indicated to him that he would not return records because he had been instructed not to by the United States Attorney. That testimony, if credited, would indicate, or would provide an inference that Agent Parisi was acting under the aegis and instructions of the United States Attorney's office rather than the Internal Revenue Service, and that would be evidence from which could be inferred that the Internal Revenue Service abandoned its civil investigation and had turned itself solely into an agency investigating crime or wrongdoing in connection with the Genser-Forman matter.

Now, Agent Parisi denied it. There is corroboration for Mr. Zuckerman's account in the form of memoranda made by him and which has been received in evidence without objection.

The Court has heard both things. The Court finds that both witnesses are telling the truth. I do not disbelieve Mr. Zuckerman and I do not disbelieve Agent Parisi. We know full well, from experience in litigation, that people hear things differently. Sometimes they misrecollect what they say, and oftentimes they speak wrong words. As an example of that, the same agent on the witness stand before us explained that he regarded all lawyers for the United States as United States Attorneys when he indicated that he regarded Regional Counsel as being a United States Attorney. He said that, I believe, even before he was cross-examined by Mr. Segal about his conversation with Mr. Zuckerman, and certainly long before it was brought to his attention that Mr. Zuckerman had such a contemporaneous memorandum.

I do not disbelieve Mr. Zuckerman. I do not disbelieve Agent Parisi. But I do find that the defendants have failed to establish that Agent Parisi was, in fact, act-

ing under the auspices of the United States Attorney prior to the time that the criminal reference letter of December 12th, 1975. Indeed, I find that he was not.

To say further, not only have the defendants failed to persuade me by a preponderance of the evidence that he was, but I am persuaded by a preponderance of the evidence that he was not. I believe Agent Parisi's testimony that he was not so employed. That is to say, that he was not involved in an investigation at the time which was commanded by the United States Attorney. To the contrary, to the extent that there was any activity in this matter prior to December 12, 1975, on behalf of the Department of Justice, it was done solely at the request of the Internal Revenue Service to aid in the Internal Revenue Service's investigation, which I find to have been an investigation, indeed, into the criminal tax liability of Genser and Forman, but also into their civil tax liability, as well.

I find further, that that investigation into their civil tax liability did not terminate even with the bringing of the indictment, but continued thereafter. The figures which have been offered as to the actual civil tax consequences in this case are truly staggering and monumental when one realizes that these are the civil tax consequences of individuals and not companies or corporations.

This Court does not and cannot find that at the time the Internal Revenue Service first began its investigation into this matter, according to Agent Parisi, in about August of 1974 or later it was not interested in the civil tax consequences of the case in which there are jeopardy assessments of nearly four and a half million dollars.

Accordingly, the Court finds that the defendants have failed to demonstrate by a preponderance of the evidence that the Internal Revenue Service at the time any of the summonses were issued had either already referred the

matter to the United States Department of Justice or had itself determined that it was interested solely in the criminal tax aspects of the matter.

I further find by a preponderance of the evidence that the United States has demonstrated that throughout the course of the investigation the Internal Revenue Service was at all times interested and actively pursuing substantial amounts of tax penalties and interest owed by the defendant Genser and the defendant Forman to the Treasury of the United States.

The Court further finds that there is absolutely no evidence whatsoever of any harassment or the kind of overt bad faith that I think the Supreme Court was addressing when it made reference to the Powell type of harassment.

The foregoing shall constitute the Court's findings of fact and conclusions of law in obedience to the command of the United States Court of Appeals for the Third Circuit.

The Clerk of the Court is directed to forthwith transmit a copy of these findings to counsel for the Government, counsel for the defendants, and to the Clerk of the United States Court of Appeals for the Third Circuit.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 76-146

UNITED STATES OF AMERICA

v.

LESTER GENSER and LAWRENCE FORMAN

ORDER.

It is on this 7th day of November, 1978,

ORDERED that the Court's Findings of Fact and Conclusions of Law be amended to include the following, which appears at pages 244-245 of the record:

> MR. SEGAL: May I remind your Honor with all deference that you promised me a finding. I don't believe you made it. And that is that—you, I believe —that you would—I interrupted my examination because of that assurance; that you would make a finding that in late 1974 the Internal Revenue Service had determined that there was criminal liability in this matter. I heard you say that.
>
> THE COURT: I thought I had. But I will say it more precisely.
>
> Throughout the course of my findings, I made reference to the fact that the Internal—that is my view that the Internal Revenue Service was pursuing, very seriously pursuing a criminal tax investigation.

Based on D-1, I have no doubt that it was the opinion of the agent at the time he wrote that report. And what he says in almost haec verba is that we can anticipate a criminal prosecution.

MR. SEGAL: And the superior signed off on that statement.

THE COURT: It so states.

MR. SEGAL: Thank you.

THE COURT: I further find, however, that the Internal Revenue Service is not bound to bring an indictment or charge or make a reference to the Department of Justice the first moment that it is persuaded that a crime has been committed.
I find, further, that they have a solemn duty to investigate fully, and that before they refer it it is their duty to uncover all of the criminality which may be involved on behalf of all who may be involved in it to the fullest extent possible, and to take such steps as may be necessary within the bounds of the law to bring all who are guilty to the Bar of Justice and to collect every penny which is due to the United States Treasury in the form of taxes, penalty and interest.

/s/ HERBERT J. STERN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2623 and 76-2624

UNITED STATES OF AMERICA,
Appellee,

v.

LESTER GENSER and LAWRENCE FORMAN,
Appellants.

(Crim. Nos. 76-146-1 and 76-146-2, D. N. J.)

APPEAL FROM THE ORDERS OF JUDGMENT AND COMMITMENT DATED NOVEMBER 11, 1976, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
December 22, 1978

Before SEITZ, *Chief Judge*, BIGGS and HUNTER, *Circuit Judges.*

(Opinion filed March 9, 1979)

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

In this aspect of these appeals we must examine the substantive and procedural implications of the Supreme Court's decision in *United States v. LaSalle National Bank*, — U. S. —, 98 S. Ct. 2357 (1978), which described the limits of the Internal Revenue Service's authority to issue civil summonses under 26 U. S. C. § 7602. Defendants Lester Genser and Lawrence Forman appealed from their convictions for tax evasion. In an earlier opinion we rejected various challenges to those convictions but retained jurisdiction and remanded the case to the district court for an evidentiary hearing on the defendants' contention that summonses issued during the investigation exceeded the IRS's authority. *United States v. Genser*, 582 F. 2d 292 (3d Cir. 1978).

On remand, the district court conducted an evidentiary hearing and concluded that none of the summonses employed during the investigation were issued "solely for a criminal purpose," as defined in *LaSalle*. In challenging that ruling, defendants argue that the district court erred in two respects: first, in denying them adequate discovery,

and second, in misconstruing the substantive requirements of *LaSalle* itself.

I

The IRS conducted an initial audit of defendants' books and records in 1971 but discovered no deficiencies. In 1974 the IRS reopened the investigation that eventually led to defendants' convictions. Our earlier opinion adequately set forth the factual predicate of those convictions. *See* 582 F. 2d at 295-96. Before the recent evidentiary hearing, however, the details of the investigation itself were veiled. The testimony and documents presented at that hearing provide the necessary vehicle to explore the reaches of *LaSalle*.

According to uncontested testimony, Frank Parisi, a special agent of the IRS, began in August 1974 to investigate defendants' corporate dealings during the taxable years 1969 to 1974. Almost immediately upon assignment to the case, he began to summon records and witnesses under 26 U. S. C. § 7602. That provision empowers agents of the IRS to issue summonses

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . .

On November 12, 1974, after issuing nineteen summonses, Parisi requested permission to reopen a formal investigation in light of new evidence from a confidential source. In the memorandum accompanying his request Parisi asserted that "[t]he investigation to date has disclosed a conspiracy between GENSER FORMAN, INC. owners and employees and various vendors, to generate currency by the use of ficticious invoices." Parisi's request to reopen was approved sequentially by his group supervisor, the chief of the audit branch of his field office, his district director, and, on November 22, 1974, the chief of the IRS's Intelligence Division, now called the Criminal Investigation Division. *See* 43 Fed. Reg. 53030 (Nov. 15, 1978).

By December 6, 1974, Parisi had begun to encounter what he believed to be recalcitrance on the part of some of the summonsed witnesses. On that date he filed a "Request for Reluctant Witness Grand Jury Authorization" pursuant to a now-revoked provision in the IRS Manual. Under that provision an IRS agent could request the assistance of a permanent grand jury in securing the testimony of reluctant witnesses. Parisi had discussed resort to this procedure with David Gaston, the IRS's Regional Counsel. As required by the Manual, the chief of the Intelligence Division approved the authorization on December 9, 1974, and forwarded the request to the United States Attorney, who approved on December 18, 1974. Although Parisi had requested grand jury subpoenas for only three persons, a total of six witnesses eventually were served. Only one witness ever had to appear before the grand jury. During this process Parisi was in almost daily contact with the United States Attorney.

Parisi substantially completed his investigation in March 1975. By that time he had issued a total of 106 summonses under section 7602. During the next six months, while writing his final report, he issued nine more summonses.

On October 31, 1975, approximately one month after Parisi filed his final report recommending prosecution, another agent assigned to the case issued the 116th and final summons. Although the record is unclear, Parisi's recom-

mendation must have been reviewed by the district chief of the Intelligence Division sometime between September and November 1975, because it reached the Office of Regional Counsel in November or December of that year. *See* 26 C. F. R. § 601.107(b) and (c). The Office of Regional Counsel formally referred the case to the Justice Department for prosecution on December 12, 1975. The IRS issued no summonses after that referral.

In considering this chain of events in light of *LaSalle*, the district court held that all the summonses were valid:

> [T]he Court finds that the defendants have failed to demonstrate by a preponderance of the evidence that the Internal Revenue Service at the time any of the summonses were issued had either already referred the matter to the United States Department of Justice or had itself determined that it was interested solely in the criminal tax aspects of the matter.
>
> I further find by a preponderance of the evidence that the United States has demonstrated that throughout the course of the investigation the Internal Revenue Service was at all times interested [in] and actively pursuing substantial amounts of tax penalties and interest owed by the defendant Genser and the defendant Forman to the Treasury of the United States.

As we requested, the district court certified its findings and the record of the proceeding to this court.

II

In our earlier opinion in this case we focused on defendants' contentions that they had standing to challenge the summonses and that evidence secured through invalid summonses must be suppressed. We did not attempt to

examine *LaSalle*'s substantive implications, leaving that task to the district court in the first instance. We therefore turn to the Supreme Court's opinion in *LaSalle* before considering defendants' substantive and procedural challenges to the disposition below.

A.

In *LaSalle* the Supreme Court elaborated upon its earlier indications that a summons could not issue under section 7602 solely to advance a criminal investigation. *See Donaldson v. United States*, 400 U. S. 517, 533 (1971). *See also Reisman v. Caplin*, 375 U. S. 440, 449 (1964). Justice Blackmun, writing for the majority, explained that Congress, in authorizing such summonses, had intended to aid the IRS in the civil collection of delinquent taxes. Congress did not intend to usurp the traditional role of the grand jury as the primary investigator of criminal activity. "[S]ummons authority does not exist to aid criminal investigations solely." — U. S. at —, 98 S. Ct. at 2367 n. 18.

The conundrum, as both the majority and the dissent recognized, is identifying those summonses that are issued "solely" to aid the criminal aspects of the investigation; criminal liability for tax evasion automatically spawns civil liability for tax delinquencies. In *LaSalle* the investigating agent had stated that his inquiry was "strictly related to criminal violations of the Internal Revenue Code." — U. S. at —, 98 S. Ct. at 2360. Nevertheless, the Supreme Court rejected the taxpayer's contention that the summonses necessarily lacked a civil purpose and should not be enforced. The entire Court agreed that the agent could not commit the IRS to a criminal prosecution and therefore his subjective intent was not dispositive.

The dissenting justices would have applied an objective test. If the summons issued before the IRS officially

referred the case to the Department of Justice for prosecution, then it would be deemed to serve a civil purpose. If it issued after referral, it would be invalid.

The majority, while agreeing with the dissenters that all summonses issued after official referral would be invalid, held that in some cases the "institutional posture" of the IRS would preclude the issuance of a civil summons even before referral to the Department of Justice:

> We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution.

— U. S. at —, 98 S. Ct. at 2367-68. Justice Blackmun noted that use of a civil summons in such circumstances would expand impermissibly the government's right to criminal discovery. Furthermore, in some cases the IRS might become "an information gathering agency for other departments, including the Department of Justice . . . ." *Id.* at —, 98 S. Ct. at 2368.

In summarizing the Court's holding, Justice Blackmun stressed "several requirements for enforcement of an internal revenue summons." One requirement was that "the Service not abandon in an institutional sense . . . the pursuit of civil tax determination or collection." — U. S. at —, 98 S. Ct. at 2368. According to the majority, however, "those opposing enforcement of a summons . . . bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." *Id.* at —, 98 S. Ct. at 2367.

B.

In this case the government argues that *LaSalle* permits the IRS, at any time before official referral, to issue

summonses as long as that agency continues to pursue civil aspects of the investigation. The district court seemed to be persuaded by this interpretation, which draws some support from a decision of the Second Circuit. *See United States v. Marine Midland Bank of New York*, 585 F. 2d 36, 39 (2d Cir. 1978) (per curiam) (the "only" inquiry under *LaSalle* is "whether the IRS 'in an institutional sense had abandoned its pursuit of . . . civil tax liability.'"). In support of its position on this issue, the government cites considerable evidence that the IRS was attempting throughout its investigation to ascertain the exact amount of tax owed by defendants. That attempt finally resulted in a jeopardy assessment against the defendants.

We recognize that Justice Blackmun wrote in *LaSalle* of the necessity for the taxpayer to prove that the IRS had "abandoned" a civil purpose. We do not believe, however, that the existence of a general civil purpose for the investigation terminates judicial inquiry. The government has failed to recognize that, under *LaSalle*, we must focus on the purposes of individual summonses and not on the purpose of the investigation as a whole. In this case, for example, the IRS issued 116 summonses under section 7602. If any one of those summonses were issued solely for a criminal purpose, the fruits of that summons would have to be suppressed, even in the face of an overwhelmingly civil purpose of the investigation as a whole. The IRS simply would lack statutory authority to issue that particular summons.

Several factors make the government's reading of *LaSalle* unreasonable. First, if the district court limits its inquiry to the existence *vel non* of a general civil purpose for the investigation, the abuses delineated by the *LaSalle* majority would go undetected and unremedied. For example, Justice Blackmun expressed a fear that the IRS

might delay official referral to the Justice Department "merely . . . to gather additional evidence for the prosecution." — U. S. at —, 98 S. Ct. at 2368. Under the government's reading of *LaSalle*, such a delay would be perfectly permissible, regardless of the purpose of the individual summonses, as long as the IRS had not yet determined the full scope of civil liability. Similarly, the government presumably would allow the Justice Department to use the IRS as an "information gathering agency" as long as the IRS had not closed its civil investigation. *LaSalle*, of course, prohibits such subterfuge. *Id.*

Second, by making the existence of a continuing civil purpose for the investigation dispositive, we would impose an impossible burden of proof upon the taxpayer. Not only would he be required to prove a negative, the nonexistence of a general civil purpose for the investigation, but he also would be required to disprove what already has been postulated, the congruence of criminal and civil liability. *See* — U. S. at —, 98 S. Ct. at 2367. As the district court noted in this case, "it is almost impossible to conceive of a case where there can be a criminal violation . . . without civil tax consequences."

By requiring a link between each summons and the proffered civil purpose, we are not requiring a district court to examine every summons issued in every investigation. *LaSalle* itself suggests clear limitations on the necessary inquiry. First, under *LaSalle*, the subjective intent of the agent issuing the summons does not bind the IRS as an institution. Drawing from this axiom, we believe that summonses issued by an investigating agent before that agent recommended prosecution would be virtually unassailable. *Cf. United States v. Schutterle*, 78-2 USTC ¶ 9773 (8th Cir. 1978) (issuance of summons one year before agent recommended prosecution "precludes any inference" that summons violates *LaSalle*). We say

"virtually" only because we can envision circumstances where, for example, an agent issued summonses at the request of the United States Attorney or delayed his recommendation at the request of his superiors solely to further a criminal investigation. Such abuses would go to the heart of the protections afforded taxpayers by *LaSalle*.

More suspect, of course, would be those summonses issued after an agent has recommended prosecution. Even in the case of such a summons, however, the taxpayer would bear the burden of proving both a pre-existing institutional commitment to prosecute and a failure of the summons to advance any civil purpose. The IRS, on the other hand, could deflect such a challenge simply by demonstrating that each summons issued after the agent's recommendation did, in fact, have a civil purpose.

We believe that our interpretation of *LaSalle* has several salutory effects. It encourages agents to complete their investigations before recommending prosecution. It discourages, but does not preclude, the issuance of summonses after such a recommendation, when the potential for abusive institutional delay is greatest. Finally, it recognizes that each and every summons issued under section 7602 must contribute in some way to a civil inquiry.

In this case, we note that the district court specifically rejected defendants' contention that Agent Parisi was influenced in his investigation by the Department of Justice. The district court found that "the defendants have failed to establish that Agent Parisi was, in fact, acting under the auspices of the United States Attorney prior to the time [of] the criminal reference letter of December 12, 1975." We believe that this finding is supported by substantial evidence. *Cf. United States v. Chemical Bank*, No. 78-6076 (2d Cir., filed Jan. 17, 1979) (IRS agent's participation in Justice Department Strike Force did not violate *LaSalle*).

The district court failed, however, to confront defendants' claim that the IRS, as an institution, had committed itself before December 12, 1975, to refer the case for prosecution and that summonses issued after that commitment served no civil purpose. Although Agent Parisi asserted that all 116 summonses were issued for a civil purpose, the district court did not make such a finding. Instead, it was content to find that the IRS maintained a continuing civil interest in the outcome of the investigation. As we have demonstrated, such a general civil purpose could not ratify an otherwise illegal summons.

In support of the existence of institutional commitment to prosecute, defendants cite Agent Parisi's suspicion of criminal activity as recorded in his reopening memorandum and his use of the grand jury to compel testimony. Although both these phases of the investigation required the approval of Parisi's superiors, we doubt that these factors, by themselves, could support a finding of institutional commitment to prosecute. We feel compelled, however, to remand this case to the district court for a specific finding on defendants' contention, especially in light of Parisi's testimony that he did not file his final report until five months after the investigation was substantially complete. Inordinate and unexplained delays in the investigatory process are one factor that might lead a court to infer that an agent was acting at the behest of his superiors solely to pursue criminal aspects of the investigation. Summonses issued during such a delay merit a court's special attention. Furthermore, we note that one summons was issued after Parisi had filed his final report.

Under these circumstances, we believe that the district court is in a better position than are we to weigh the evidence and to draw conclusions about possible institutional commitment.

C.

Having outlined the substantive implications of *LaSalle*, we now must consider defendants' contention that the district court improperly limited their discovery before and during the evidentiary hearing. Prior to the hearing the district court denied defendants' motions to discover the contents of the IRS's investigatory files on the case, except insofar as the government consented. Defendants responded by subpoenaing the appearance of twenty witnesses at the hearing, including the Commissioner of Internal Revenue, the United States Attorney for the District of New Jersey, and various high-ranking officials of the Criminal Tax Section of the Department of Justice. Each subpoena directed the witness to produce all documents relating to the case. The district court refused to enforce any of the subpoenas. Agent Parisi testified at the hearing, but the district court refused to order him to open his files. Instead, the district court granted defendants limited discovery of documents relating to phases of the investigation brought out during Parisi's testimony.

Our reading of *LaSalle* suggests several guidelines for discovery. At a minimum, the taxpayer should be entitled to discover the identities of the investigating agents, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation, the date the Office of Regional Counsel referred the matter for prosecution, and the dates of all summonses issued under 26 U. S. C. § 7602. Furthermore, the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.

Where this information or other evidence introduced by the taxpayer reveals (1) that the IRS issued summonses

after the investigating agents recommended prosecution, (2) that inordinate and unexplained delays in the investigation transpired, or (3) that the investigating agents were in contact with the Department of Justice, the district court must allow the taxpayer to investigate further. In proper cases, this investigation could include the opportunity to examine the IRS agents or officials involved, or to discover documents. Such examination/discovery, however, should be carefully tailored to meet the purpose of the inquiry. On the other hand, where this information indicates that none of these three conditions are present, the district court need inquire no further.

In this case the district court's rulings conformed very closely to these guidelines. During Parisi's testimony the district court allowed defendants to discover the available documents relating to the reopening of the investigation and the use of the grand jury. Furthermore, defendants learned virtually all the dates listed above, except perhaps the date of review by the district chief of the Intelligence Division. Although defendants had the opportunity to press Parisi on the five-month delay in the filing of his report and on the issuance of a summons after that filing, they did not pursue those matters. In considering these issues on remand, the district court should determine whether to afford defendants additional discovery and whether to conduct further proceedings.

III

Although we share the government's concern that defendants accused of tax evasion may employ the outlined procedures to delay or frustrate justice, we feel obligated to provide a procedural mechanism to vindicate *LaSalle*'s substantive guarantees. In the absence of congressional action defining the scope of the IRS's power to issue summonses, courts must continue to search for the vague boundary between civil and criminal investigation.

We will retain jurisdiction over this appeal and will remand to the district court for appropriate proceedings and findings and for prompt certification of the supplemental record to this court.

BIGGS, *Circuit Judge, dissenting.*

116 section 7602 summonses were issued during the following periods: 1 through 19: August 28 to November 12, 1974; 20 through 99: November 12, 1974 to January 31, 1975; and 100 through 116: January 31 to October 31, 1975. Further, there is evidence in the record establishing the fact that each of these summonses was issued as part of simultaneous civil and criminal investigations.

Agent Parisi testified on re-direct examination by Mr. Mendelson, an Assistant United States Attorney, as follows:

> "Q. [By Mr. Mendelson] We indicated earlier this morning [that] *116* [Section 7602] summonses were served during your investigation, is that correct?
>
> A. I believe that's true. [Emphasis added].
>
> Q. Were any of those summons issued solely for the purpose of acquiring criminal evidence?
>
> A. No, sir.
>
> Q. *What was your purpose in issuing each and every one of these summonses generally?*
>
> A. *There was a two-fold purpose; to determine any income tax liability of the taxpayers, and to gather evidence to assist the Internal Revenue Service to determine whether or not there has been a criminal violation of the Internal Revenue laws.* [Emphasis added].

Q. When you say 'taxpayers' who do you mean?
A. Corporate taxpayer Genser-Forman, Incorporated, Lester Genser and Laurence Forman." (Evidentiary Hearing at 176).

It is clear from the foregoing portion of the record of the evidentiary hearing that the 116th section 7602 summons was brought to the attention of the court and counsel at the evidentiary hearing, and it is also clear from that portion of the evidentiary hearing quoted above that Parisi testified that the purpose of the 116th summons was to gain evidence for the civil recovery of unpaid taxes and also to determine whether or not there was criminal liability.

I do not doubt that *United States v. LaSalle National Bank*, — U. S. — (1978), governs the case at bar. The teaching of the Supreme Court in *LaSalle* is exactly expressed, in my view, by Nuzum, *LaSalle National Bank and the Judicial Defenses to the Enforcement of an Administrative Summons*, 32 The Tax Lawyer 383, 391 (1979), as follows:

"B. *Supreme Court Opinion.* In a 5-4 decision authored by Justice Blackmun, the Supreme Court reversed the Seventh Circuit's opinion and held (1) that a summons must be issued before the Service recommends prosecution to the Department of Justice; [1] (2) that a summons issued prior to such recommendation must be issued in good faith and that a summons issued solely for a criminal investigation is not in good faith; and (3) that the Service is not using its summons authority in good faith if it has abandoned, in an institutional sense, the pursuit of civil tax determination or collection."

1. *The referral letter of the Internal Revenue Service to the Department of Justice was dated December 12, 1975.*
Parisi's final report was forwarded to the Regional Counsel in September 1975 (Evidentiary Hearing at 62), and the evidentiary hearing upon our remand, when Parisi made the statements quoted above, was October 31, 1978.

To the above I add the following by way of further interpretation of *LaSalle*. To enforce a section 7602 summons, the IRS must have issued it in good faith use of the authority of section 7602. The IRS must not abandon its institutional authority to determine and collect taxes and civil fraud penalties. The IRS also must not abandon its institutional authority to determine the existence of violation of criminal laws relating to taxation. The two functions are intertwined. That a single agent has in mind gathering evidence for a criminal investigation does not prove institutional bad faith on the part of the IRS. A taxpayer in order to escape the effect of a section 7602 summons must disprove the existence of a valid civil tax determination or collection purpose by the IRS. This the appellants cannot do, for there was, and apparently still is, a valid civil tax investigation resulting in tax liens against the appellants which were in fact ameliorated to some extent by the agreement to release some of the appellants' assets. See Exhibit G-6 (Evidentiary Hearing at 227).

For the reasons stated, I must respectfully dissent. I deem another evidentiary hearing, which the majority opinion requires, as unnecessary and I would grant the motion of the United States and immediately send down the certified judgment in lieu of the formal mandate.[2]

2. The majority lays emphasis on what it regards as "inordinate and unexplained delays in the investigation" (Majority Opinion at 10). *The time factor is not relevant in view of the fact that there was investigation by the IRS as to civil as well as criminal liability during the critical period.*
The following dates are relevant:
The last summons, No. 116 (by Gary Neuberger), was issued October 31, 1975 (Evidentiary Hearing at 61).

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF JUDGE HERBERT J. STERN, U. S. DISTRICT JUDGE, AND RELATED TRANSCRIPT REFERENCES, APRIL 27, 1979.

THE COURT: All right. The history in this area is an interesting one and we are privileged, I think, in this case to be among those who are able to help the continuing unfolding of the law in this most difficult area.

If counsel has at any moment taken offense to my remarks, for my part I beg to be excused for no offense was intended.

We are dealing in an area which is new because I think it is constantly evolving. If I would be permitted a private reflection, I would think that we began this pass in 1886 with the Boyd case. I think that our feet are trodding a path that was set then, when the Supreme Court of the United States in an opinion by Mr. Justice Bradley held that in a criminal case or in, to be more precise—the Boyd case really wasn't a criminal case, but was one that was like a criminal case. Mr. Justice Bradley found in such a case the books and records of an individual were not subpoenable.

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2. (Cont'd.)

Agent Parisi started to write his report in March of 1975 (Evidentiary Hearing at 61).

Agent Parisi's final report was sent to the Regional Counsel in September of 1975 (Evidentiary Hearing at 62).

Referral to the Department of Justice for prosecution was December 12, 1975 (Evidentiary Hearing at 143-44).

I believe the majority refers to the lapse of time between the date when Parisi started his report and the date he sent it to the Regional Counsel. This lapse was less than six months.

I believe this delay and any others have little significance, if, in fact, delays they be. Judicial notice may be taken of the fact that the IRS does not move with startling speed. To my mind, the delay or delays not only seem short, but to me Parisi seems to have acted with reasonable promptness.

The fact that the underpinning of that case has been largely eviscerated is probably without any immediate legal significance here now at this level.

The case of United States v. Fisher and Andressen v. Maryland leave little doubt in this Court's mind that the underpinnings of the Boyd case, as Mr. Justice White in United States v. Fisher said, "have not stood the test of time."

Unfortunately for us, however, it appears to have stood the test of time long enough to have mandated that the United States Supreme Court many years ago following, I think, the imprimatur of the Boyd case, anxious to preserve Fifth amendment rights on the one hand but anxious on the other that the civil tax be collected carved out an accommodation; that is to say, I think it tried to find a way in which process could issue to compel things. That is to say, IRS could compel things, books and records, which it needed to collect the revenue on the one hand, but, on the other hand, not traverse individuals' Fifth Amendment rights.

And so the distinction, I think, began for those reasons and were promulgated later and built on even more; that while IRS could issue certain kinds of process to get books and records, if its purpose was a civil one, it could not do so if its purpose was a criminal one.

Whether I am correct or not, and the reasons for the underpinnings of the rule, the fact remains that we deal with this rule in its present form as modified by the cases and as further modified by LaSalle and as it is being developed within this very case in an exciting way within this Circuit.

So, using what we have, we are attempting to apply a standard which is a very difficult one because everybody recognizes that the Internal Revenue Service has a dual

role at all times. It has the duty of bringing those who violate the criminal provisions of the law to the bar of justice and aid in that endeavor. It has a concern and a duty to collect the revenues which are due the United States. And we know, further, and every case that has addressed this recently, whether it be LaSalle on the one hand or the Circuit twice in this one or myself several times already, every Court recognizes that where you have the kind of civil facts—withdrawn. Where you have criminal fraud, you almost always have civil tax due. That is to say, when somebody withholds taxes due the United States and, thus, commits a crime, they almost invariably subject themselves to civil liability as well.

One agency is charged with investigating both. One form of process may legitimately be used for only one. The finest surgeon in the world would have grave difficulty in carving out under these circumstances what is solely criminal from what is solely civil. Neverthless, we are charged with that duty and we shall do the very best we can.

After hearing the testimony now in two hearings and examining such documents and evidence which has been presented to me and recognizing on the one hand, in fairness to the defendants, that they do not have available to them the entirety of the government files, but recognizing also if we were to make these files available on the mere allegation there was wrongdoing or in order to find out if there was wrongdoing in the issuing of summonses, we would, in effect, say there was no longer any confidentiality in any of these files for anybody accused of violating the criminal provisions of the Internal Revenue Service Code.

Recognizing all of this, I find that the 116 summonses which were issued in this case were issued for a civil purpose; that each and every one of them was issued for a civil purpose.

I find, further, that there was no inordinate delay. Furthermore, I find that there was no delay whatsoever occasioned for a criminal purpose.

As far as the documents which have been offered and received in evidence, Defendants' Exhibits 1 and 2 are concerned, based on the testimony I have heard and based on the fact that I presided over an extended trial involving these two defendants and heard the evidence in the criminal context, some of which touched upon the subject matters of these two summonses, I find that—I know that that evidence while indeed useful for a criminal purpose was useful and indeed indispensable in computing the civil tax owed by the defendants as well.

I find that these two summonses were not issued solely for criminal purpose but were issued for a civil purpose as well.

I find, further, that there was no extraordinary delay of any kind. Indeed, I find, given what we usually see in these courts by way of processing of IRS civil investigations or criminal investigations, or civil and criminal investigations, there not only was no inordinate delay but by those terms the investigation proceeded very rapidly indeed.

In sum, the Court finds by a preponderance of the evidence and more that each one of the questioned summonses in this case was issue for a civil purpose. Undoubtedly some, perhaps even all, were useful to the United States in the prosecution of the criminal case. But I find by a preponderance of the evidence and more that each one of them was useful and intended to be useful and issued for a civil purpose; namely, the computation of the tax due and owing from Genser, Forman and from Genser-Forman.

Before going on in my findings of facts, and I certify upon the record of this Court that they are, and I certify

it to the Honorable Judges of the United States Court of Appeals for the Third Circuit.

Do you want to say something?

MR. MENDELSON: Yes. I want to inquire whether your Honor would be disposed to make one additional finding. In effect, an ultimate conclusory finding, which may not be necessary given the findings your Honor has already made but which I request on behalf of the United States in any event. And that is in substance that your Honor finds based upon the entire record no summons was issued after the IRS formed an institutional commitment to recommend prosecution.

THE COURT: What does "an institutional commitment to recommend prosecution" mean?

MR. MENDELSON: The government's view is that December 12, 1975, the date of the Regional Counsel criminal reference letter, that is substantiated by Mrs. Vorsanger's testimony——

THE COURT: I would have trouble making a finding that no summons was issued before or rather after December 12, and I don't think there is a contention that any was.

Am I correct, Mr. Segal?

MR. SEGAL: So far as I know.

THE COURT: I will not, however, as a United States District Judge make the finding you ask me to make. I will not do that as a matter of conscience. It is wrong. If institutional bad faith is defined as that moment when a certain letter is passed, I might be able to do it. But until I am definitively told by a higher court that is what it means, I must undertake to do it as a human being. And I believe that from the first moment a representative of the

Internal Revenue Service knows that a taxpayer has committed $10,000,000 worth, [of tax evasion] they have a pretty good commitment to prosecute, And anybody who doesn't know that, it seems to me, is completely out of touch with reality. But in my view the mere fact that we know that does not mean that the Internal Revenue Service does not have a right and indeed the duty to go out and collect the revenue as well.

Now, I'm sorry I can't make the finding you want, but I just can't do it for the reasons that I have indicated. I don't think more is required. If you want me to sign the minutes or can we just send the minutes down?

MR. SEGAL: Your Honor knows I won't quarrel with the form. Whatever form your Honor desires to get it back to the Court is fine with me.

THE COURT: I want to get it back to them.

MR. SEGAL: Sure.

THE COURT: So they can take the next step.

MR. SEGAL: We have no suggestion as to form. I'm sure—I, myself, feel assured that the form you have used will give your findings to the Court of Appeals.

THE COURT: Are they clear enough so you got a record?

MR. SEGAL: I believe they are clear, your Honor.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2623 and 76-2624

UNITED STATES OF AMERICA,
Appellee,

v.

LESTER GENSER and LAWRENCE FORMAN,
Appellants.

(Crim. Nos. 76-146-1 and 76-146-2, D. N. J.)

APPEAL FROM THE ORDERS OF JUDGMENT AND COMMITMENT DATED NOVEMBER 11, 1976, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
June 13, 1979

Before SEITZ, *Chief Judge*, GIBBONS and HUNTER, *Circuit Judges.*

(Opinion filed July 16, 1979)

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OPINION OF THE COURT

PER CURIAM.

Appellants are now before this Court for the third time, challenging their convictions for income tax evasion. We initially remanded this case to the district court for an evidentiary hearing exploring their contention that summonses had been issued by the IRS, pursuant to 26 U. S. C. § 7602, "solely for a criminal purpose," and thus were invalid under *United States v. LaSalle National Bank*, 437 U. S. 298 (1978). *United States v. Genser*, 582 F. 2d 292 (3d Cir. 1978). Following that hearing the district court found by a preponderance of the evidence that all of the summonses that had been issued were valid because the IRS had been interested, throughout the course of its investigation, in pursuing civil tax liabilities owed by the appellants.

We determined that it was necessary to retain jurisdiction over this appeal and remand the case for further findings because the district court had "failed . . . to confront defendants' claim that the IRS, as an institution, had committed itself before December 12, 1975, to refer the case for prosecution and that summonses issued after

that commitment served no civil purpose." *United States v. Genser*, 595 F. 2d 146, 151 (3d Cir. 1979). We deemed the district court's finding that the IRS had maintained a continuing civil interest in the outcome of the investigation an inadequate response to the appellant's contention because of our belief that *LaSalle* mandates that a court focus on the purpose of each individual summons. Noting that some of the summonses in this case had been issued after Frank Parisi, the IRS agent conducting the investigation, had substantially completed his work, and that "[i]nordinate and unexplained delays in the investigatory process are one factor that might lead a court to infer that an agent was acting at the behest of his superiors solely to pursue criminal aspects of the investigation," *id.* at 152, we remanded this case to the district court for additional findings.

After conducting an evidentiary hearing, at which Agent Parisi testified and was subjected to cross-examination, the district court entered its findings of fact. The court found, "by a preponderance of the evidence and more that each one of the questioned summonses in this case was issue[d] for a civil purpose," that there had been no "inordinate" or "extraordinary" delay in the IRS's investigation, and that two summonses that appellants introduced into evidence and about which Agent Parisi was questioned, had been "useful and indeed indispensable in computing the civil tax owed by the defendants." The court explicitly refused, however, to make a finding requested by the government that "no summons was issued after the IRS formed an institutional commitment to recommend prosecution." To the contrary, the court noted its belief "that from the first moment a representative of the Internal Revenue Service knows that a taxpayer has committed $10,000,000 worth [of tax evasion], they have a pretty good commitment to prosecute."

The appellants rely on the latter statement as support for the contention they now raise. Their present position is that, given an obvious institutional commitment on the part of the IRS to eventually recommend this case to the Justice Department for prosecution, the district court abused its discretion, and ignored the dictates of this court's opinion and that of the Supreme Court in *LaSalle*, by failing to hold a "meaningful" evidentiary hearing. Appellants contend that the hearing they were afforded on remand was less than meaningful because they were unable to cross-examine Parisi about contacts he had with Justice Department officials and his IRS superiors during his investigation and because they were denied production of a rough draft of Parisi's final report, of all summonses issued by Parisi after his initial contact with the Justice Department, and of the evidence obtained from those summonses.

The district court's statement about the Service's institutional commitment, standing alone, offers no support to the appellants' contention. It is not just an institutional commitment to recommend prosecution that renders a summons issued under § 7602 invalid; rather, it is the absence of a civil purpose for that summons that triggers the *LaSalle* rule. As the Supreme Court there stated: "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral *and the Service merely would like to gather additional evidence for the prosecution.*" 437 U. S. at 316-17 (emphasis supplied). Likewise, in remanding this case to the district court, we noted: "The district court failed, however, to confront defendants' claim that the IRS, as an institution, had committed itself before December 12, 1975, to refer the case

for prosecution *and that summonses issued after that commitment served no civil purpose.*" 595 F. 2d at 151 (emphasis supplied).

The burden placed on criminal defendants in appellants' position is a heavy one. They "bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." *LaSalle, supra* at 316. During the course of most investigations where significant amounts of civil liability are involved the IRS agents conducting and reviewing the inquiry will recognize that a recommendation for criminal prosecution might eventually be forthcoming. Nevertheless, a valid summons still may be issued under § 7602 so long as the IRS uses that summons to pursue civil penalties and interest. As the Court stated in *LaSalle*: "For a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." *Id.* at 314.

In our earlier opinion we recognized several indicators that could lead a reviewing court to infer that a given case may present such an "extraordinary departure" from those "normally inseparable goals." Where such indicators are present we stated that it may be necessary for the district court to scrutinize each suspect summons in order to satisfy itself of the existence of the requisite link between that summons and the IRS's proferred civil purpose. 595 F. 2d at 151.

One such indicator, of course, would be evidence that the Justice Department influenced the conduct of an IRS investigation, and the appellants here contend that their inquiries into Agent Parisi's contacts with Justice Department officials were unduly limited by the district court.

We have already affirmed a finding by the district court, however, that "specifically rejected defendants' contention that Agent Parisi was influenced in his investigation by the Department of Justice." *Id.* Thus the district court did not err in limiting the appellant's inquiry into this area after remand.

We identified the issuance of a summons after the date of an IRS agent's recommendation that a case be referred to the Justice Department for prosecution as a second indicator that might lead a court to infer that the summons was not designed to advance a legitimate civil purpose. *Id.* One such summons was issued in this case following the filing of Agent Parisi's final report recommending prosecution. The defendants have been given access to that summons, however, and the district court has satisfied itself that the evidence obtained from that summons advanced a civil purpose.

Recognizing the possibility that an IRS investigating agent might delay his formal recommendation that a case be referred for prosecution, and that summonses might be issued during that period of delay solely for a criminal purpose, we noted that summonses issued during periods of "inordinate and unexplained" delay in the investigation would also merit special attention. *Id.* at 152. Because Agent Parisi did not file his final report in this case until five months after his investigation was substantially completed, we asked the district court to focus its inquiry on the causes of that delay. Based on its evaluation of Parisi's testimony and the record developed earlier in this case, the district court found that there were no delays of any kind during the course of the IRS's investigation. The court stated:

> Indeed, I find, given what we usually see in these courts by way of processing of IRS civil investigations

or criminal investigations, or civil and criminal investigations, there not only was no inordinate delay but by those terms the investigation proceeded very rapidly indeed.

Having so found, the district court was not obligated by the terms of our prior opinion to examine each summons, or the evidence derived therefrom, that was issued during the period between the substantial completion of Agent Parisi's investigation and the filing of his final report. Moreover, we conclude that the district court did not abuse its discretion in limiting appellants' cross-examination of Parisi, or in failing to grant appellants' request that Parisi's draft report, the 96 summonses issued after November, 1974, and the evidence derived therefrom, be produced.

We conclude that the district court's findings, based on Parisi's sworn testimony, that there were no inordinate or unexplained delays in the IRS's investigation and that each of the questioned summonses served a civil purpose, are not clearly erroneous. The appellants' request that this matter again be remanded to the district court for yet another evidentiary hearing will be denied.

We have previously determined that the other grounds raised by appellants in support of their contention that their convictions must be reversed are without merit. *See United States v. Genser*, 582 F. 2d at 296-99. We now conclude that, with respect to each of the summonses issued during the IRS's investigation of this case, the appellants have failed to meet their heavy burden of "disprov[ing] the actual existence of a valid civil tax determination or collection purpose by the Service." *LaSalle, supra* at 316. The judgments of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2623/76-2624

UNITED STATES OF AMERICA

v.

GENSER, LESTER,
Appellant in No. 76-2623

FORMAN, LAWRENCE,
Appellant in No. 76-2624

(D. C. Criminal No. 76-146-1 and 2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and GIBBONS and HUNTER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted Under Third Circuit Rule 12(6) June 13, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said

District Court, dated November 11, 1976, be, and the same are hereby affirmed.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

July 16, 1979